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In the

Supreme Court of the United States

OCTOBER TERM, 1948

No._____

HARRY W. SCHUERMANN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry W. Schuermann, respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the judgment of said Court affirming the judgment of conviction of petitioner of income tax evasion in the appeal therein pending numbered 13,798, wherein your petitioner was appellant and the United States of America was appellee. A certified transcript of the record in said case, including the proceedings and opinion in the said Court of Appeals has been filed in this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner was convicted on all four counts of an indictment charging him with having wilfully attempted to defeat and evade the payment of income taxes for the years 1942, 1943, 1944 and 1945 by filing false returns for each of said years, wilfully understating his net income, in violation of Section 145(b) of Title 26, United States Code[1] (R. 5-8). He appealed in due course to the Court of Appeals (R. 1-4).

In accordance with bills of particulars (R. 19-23), the government's case was presented solely on the "increasing net worth-expenditure" theory, upon the assumption, without proof, that petitioner had no assets other than a negligible amount as of December 31, 1941, and that therefore all of his expenditures and investments thereafter made were attributable to and reflected his current income for the year of such expenditure.

Petitioner was engaged in the policy, or numbers, business, but no evidence was offered to show how petitioner operated said business nor the extent of his operations. Only the name of the business was shown. There was no evidence of income received by petitioner or of receipts or substantial bank deposits by him. His net worth as of December 31, 1941, and as of December 31 of each year thereafter was not proved. The Government's case consisted of proving that petitioner loaned money to friends and made investments and expenditures in an aggregate

[1]The pertinent part of this statute provides:

"... any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

amount exceeding his reported net taxable income for the years in question. Petitioner offered evidence tending to show that his expenditures were made out of capital available to him from prior accumulations. At the conclusion, both of the Government's case and of the whole case, petitioner submitted motions for judgment of acquittal as to each count of the indictment grounded on the insufficiency of the evidence, which motions were overruled, and renewed his motion for judgment of acquittal after the verdict of guilty was returned and the jury discharged. This motion was again overruled (R. 932).

Petitioner did not testify in his own behalf. The argument of the Government attorneys could be construed as commenting on petitioner's failure to testify (R. 832, 835, 863). At the conclusion of counsel's argument to the jury, and ninety-five minutes before the Court charged the jury, petitioner submitted twenty-two requests for instructions (R. 868, 869), including the following:

> "The Court instructs the jury that the fact that defendant has not testified in his own behalf does not create any presumption of guilt against him. * * * And the Court further instructs the jury that it must not permit the fact that defendant has not testified in his own behalf to weigh in the slightest degree against the defendant, nor should this fact be permitted to enter into the discussions or deliberations of the jury in any manner[2]" (R. 871-872).

The Court took petitioner's requests for instructions under advisement, stating he would grant some of them (R. 868). At the conclusion of the recess and immediately prior to charging the jury, the Court stated that he had gone over the instructions submitted to him and that he

[2]The portion of the requested instruction omitted herein was partially covered by the Court's charge to the jury (R. 892).

thought the substance of most of them was included in his charge (R. 869). In his memorandum overruling petitioner's motion for a new trial, the trial court stated that it was his opinion that the requested instruction did not correctly state the law (R. 931). The Court of Appeals held that the instruction was a correct statement of the law. No instruction was given to the jury advising them that the failure of petitioner to testify did not create any presumption against him. The charge was specifically excepted to on the ground that it contained no instruction to such effect (R. 906).

The Court of Appeals for the Eighth Circuit affirmed the convictions, holding (1) that the denial of petitioner's motion for judgment of acquittal was not error, even though the case was presented solely on the net worth-expenditure theory based on expenditures in excess of reported net taxable income and "the evidence of the Government does not exclude the possibility that the defendant had some substantial accumulation of capital on December 31, 1941 * * * out of which he made the loans, investments and expenditures which the Government contends reflects income," and (2) that the District Court's denial of petitioner's request to instruct the jury that his failure to testify created no presumption of guilt did not entitle him to a reversal of the judgment, under the rule of **Bruno v. United States,** 308 U. S. 287, even though the District Court read and considered the instruction, and even though petitioner excepted to the charge because of the omission of such an instruction therefrom, for the reason that the request to so instruct was made after the argument to the jury and no copy was furnished the Government attorney as provided in Rule 30 of the Rules of Criminal Procedure.

JURISDICTION.

Petitioner was convicted of income tax evasion, a felony under Section 145(b) of Title 26, U.S.C. The judgment and opinion of the Court of Appeals affirming his conviction was entered May 10, 1949 (R. 965, 976). A petition for rehearing pursuant to the rules of the Court of Appeals was timely filed on May 24, 1949 (R. 977); said petition was denied and the opinion of the Court corrected on June 8, 1949 (R. 1003), at which time the judgment became final. The Court of Appeals has stayed the issuance of its mandate pending this proceeding (R. 1005). This petition for certiorari is filed within thirty days thereafter and within the time provided by Rule 37(b) of the Rules of Criminal Procedure. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. May the net worth-expenditure method of computing taxable net income be utilized if the Government does not establish defendant's net worth at the commencement of the tax period?

2. When the Government fails to establish the defendant's net worth at the beginning of the tax period and offers no proof of income, may it be inferred that disbursements consisting of loans, investments and expenditures are attributable to and reflect the defendant's current taxable income for the year of such disbursements, on the basis of an inference drawn from prior tax returns, that there is little likelihood that defendant had accumulated a substantial surplus from his activities?

3. Is evidence of loans, investments and expenditures made by defendant over a four-year period in an aggre-

gate amount exceeding his reported net taxable income for such period sufficient proof of receipt of unreported income by him in each such year on the net worth-expenditure method of computing unreported income when the Government fails to establish the defendant's net worth at the beginning of each of the taxable periods and the Government's evidence does not exclude the possibility that defendant had some substantial accumulation of capital at the beginning of the period?

4. In deciding whether the trial court erred in holding that the evidence was sufficient, may the Court of Appeals properly sustain such ruling by relying heavily on the sound judgment of the trial court in appraising the sufficiency of the evidence without thereby making the trial judge the court of last resort and depriving defendant of his right of appeal?

5. Is a defendant who does not testify entitled as a matter of right (under the Act of March 16, 1878) to an instruction that his failure to testify creates no presumption against him, when he requests such an instruction prior to the charge being read to the jury and specifically excepts to the charge as given because it does not include such an instruction?

6. Does a request for an instruction that the failure of defendant to testify shall create no presumption of guilt against him and an exception to the charge on the ground that it does not include such an instruction sufficiently inform the trial judge that the defendant has elected to have the jury so instructed, within the rule of this Court's decision in **Bruno v. Untited States**, 308 U. S. 287?

7. When the argument of the Government attorneys could be construed by the jury as commenting on defendant's failure to testify, does Rule 30 of the Rules of

Criminal Procedure, providing that requests be submitted prior to the argument, apply to a request made after the argument that the Court instruct the jury that defendant's failure to testify creates no presumption of guilt against him and that the jury must not permit that fact to weigh in the slightest degree against him or affect their deliberations in any manner?

8. Is the assumed failure of defendant's counsel to furnish a copy of the requested instruction to the government attorney "a fatal error" on their part, depriving defendant of his right to the instruction, when the government attorneys were present at the time the instruction was submitted to the Court, made no objection and requested no copies, and the trial Court considered the instruction on its merits without mention of the point?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision in this case is in conflict with the decision of the Court of Appeals for the Fifth Circuit in the case of **J. Baker Bryan, Sr., v. United States,** not yet reported, decided May 13, 1949. Each case was tried on the net worth-expenditure method, on the theory that all investments and expenditures in a particular year in excess of the reported net taxable income for such year were attributable to and reflected unreported taxable income earned in the year of expenditure. In each case there was no proof of the defendant's net worth at the beginning of the taxable period involved and only an assumption that disbursements in excess of reported income were made out of current taxable income and that they represented an increase rather than a change in the form of the defendant's actual net worth.

The Court of Appeals for the Eighth Circuit in this case held that such evidence was sufficient to make out a case on the net worth-expenditures method and that the case was properly submitted to the jury.

The Court of Appeals for the Fifth Circuit in the **Bryan** case reversed the judgment of conviction, holding that such evidence was insufficient to make out a prima facie case against the defendant on the net worth-expenditure basis, and that the case should not have been submitted to the jury.

2. The decision of the Court of Appeals for the Eighth Circuit in this case is also in conflict with the decision of the Court of Appeals for the Seventh Circuit in **United States v. Chapman**, 168 F. (2d) 997.

The Court of Appeals for the Eighth Circuit in this case has held that a net worth case may be submitted to the jury although there is no substantial evidence of the defendant's net worth at the starting point.

The Court of Appeals for the Seventh Circuit in the **Chapman** case held that in a net worth case the starting point must be based upon a solid foundation and that even a defendant's oral admission to a Revenue Agent is not sufficient. The conviction in the **Chapman** case was affirmed because the government established a definite starting point from defendant's own books and records in computing defendant's net worth. In this case the Government had no books and records available and the Court in effect has held that the absence of such records dispenses with the necessity of proving a definite starting point.

3. The decision of the Court of Appeals for the Eighth Circuit in this case, if permitted to stand, decides an important question of federal law which it is in the public interest to have settled by this Court, namely, whether

evidence that the aggregate sum of a defendant's loans, investments and expenditures in a given year exceeds his reported net taxable income for such year is sufficient proof that such excess constitutes unreported taxable income received in the year of expenditure, although there is no proof of income and no substantial evidence of defendant's net worth at the beginning of the taxable year. The decision of the Court of Appeals is predicated upon its holding that the loans and investments may be presumed or assumed to have been made out of taxable income received during the year of disbursement. The facts so presumed are not based upon substantial evidence, but instead are based upon the presumption without evidentiary support that loans and investments in excess of reported income represent an increase in net worth. The decision, therefore, is in conflict with the decisions of this Court in **United States v. Ross**, 92 U. S. 281, and **Manning v. John Hancock Life Insurance Co.**, 100 U. S. 693, to the effect that presumptions and inferences may not be based on other presumptions.

Counsel for petitioner have been informed that the opinion in the instant case is being cited and applied in numerous cases to force settlements advantageous to the Government, as well as being utilized in criminal cases. Because of the fact that this problem recurs in many of the ever-increasing number of income tax evasion prosecutions, it is in the public interest that this Court authoritatively rule whether the net worth-expenditure method of computing unreported income may be utilized where the Government fails to establish the defendant's net worth at the beginning of the taxable period.

4. The decision of the Court of Appeals in this case has misconstrued and misapplied the decision of this Court in **United States v. Johnson**, 319 U. S. 503. In the **Johnson**

case there was a "voluminous body of lurid and tedious testimony" taken during a six-weeks' trial, which supported the finding that Johnson was the proprietor of certain gambling houses whose income he had not reported and that the other defendants were merely screens behind which he operated. There was also proof (including his financial statement) that Johnson's expenditures exceeded his available declared resources. This Court, after reviewing the evidence, pointed out that both Courts below had concurred in the sufficiency of the evidence. In this case there was no evidence that petitioner concealed his policy operations behind "screens" or that his expenditures exceeded his "declared resources." The Court of Appeals has construed this Court's decision in the **Johnson** case to mean that in income tax evasion cases the appellate courts must rely heavily upon the judgment of the trial courts in appraising the sufficiency of the evidence, thus overlooking the effect of differences in quality and quantity of proof in different cases, as well as the essential difference between the appellate function of the Court of Appeals and the reviewing function of this Court on certiorari. The **Johnson** case is erroneously construed to mean that in tax evasion cases less proof is required than in other criminal cases, because of the assumed difficulty of obtaining such proof, and that the trial Court is for practical purposes the Court of last resort.

5. The decision of the Court of Appeals for the Eighth Circuit is in conflict with the decision of this Court in **Bruno v. United States**, 308 U. S. 287.

In the **Bruno** case this Court held that by the Act of March 16, 1878, Congress gave a defendant who does not testify the indefeasible right to have the jury told that his failure to testify does not create any presumption against him and that a disregard of that right is an error affecting

the substantial rights of the defendant entitling him to a reversal.

In this case the Court of Appeals for the Eighth Circuit has held that the trial Court's denial of petitioner's request that the Court instruct the jury that his failure to testify created no presumption of guilt does not entitle him to a reversal, although the request was made prior to the Court's charge to the jury and was considered by the trial Court (and denied because of the Court's mistaken belief that the requested instruction did not state the law correctly), and the petitioner excepted to the Court's charge because of the omission therefrom of an instruction on the subject. The reasons for the ruling were that the petitioner's request was "belated" under Rule 30 of the Rules of Criminal Procedure, that the District Attorney was not furnished a copy, and that the trial judge was not sufficiently advised by the exception that petitioner had elected to have the Court so instruct the jury. Thus, although the trial Court waived the application of Rule 30 by considering the instruction and erroneously declining to give it on the merits, and the District Attorney waived the point by making no objection, and although it was the duty of the trial Court to give the instruction, the Court of Appeals held that the error of the trial Court affecting petitioner's substantial rights may be disregarded because of defendant's technical non-compliance with Rule 30.

The decision is further in conflict with the decision in the **Bruno** case in that the Court of Appeals has held in this case that a request for an instruction on the subject, together with an exception to the charge on the ground "it did not include an instruction that the fact that defendant had not testified in his own behalf did not create any presumption of guilt," did not advise the trial Court that the petitioner had "elected" to have the Court so instruct the

jury. In the **Bruno** case there was no election other than the mere request for the instruction and an exception to its denial.

6. The Court of Appeals in this case has decided an important question in the administration of criminal justice which should be settled by this Court, namely, whether a defendant who does not testify is entitled as a matter of right to an instruction to the effect that his failure to testify creates no presumption against him, even though the instruction is requested after the argument, particularly where the defendant specifically excepts to the charge on the ground it does not include such an instruction. This Court, in **Bruno v. United States,** 308 U. S. 287, held that the trial Court was under a duty to comply with the Congressional mandate as expressed in the statute (Act of March 16, 1878), "certainly when appropriately invoked." This Court should decide whether Rule 30 of the Rules of Criminal Procedure, which became effective after the Bruno case, should be construed to mean that the trial Court is no longer under a duty to so instruct the jury unless an instruction is requested in accordance with Rule 30 and defendant specifically informs the Court that he has "elected" to have the Court so instruct the jury. The Court of Appeals has so ruled, on the premise that "unless the defendant chose to have that instruction given, the giving of it would be error" (this statement being later corrected by the Court, in connection with overruling the petition for rehearing, by substituting the words "of doubtful propriety" for the word "error"). This decision is the first ruling since the **Bruno** decision which questions the propriety of the trial Court's compliance with the Congressional mandate without a request therefor. Both the Court of Appeals for the District of Columbia [in **Smith v. United States,** 112 F. (2d) 217] and the Court of Appeals

for the Fifth Circuit [in **Chadwick v. United States**, 117 F. (2d) 902] have held it proper to give such an instruction on the Court's own motion. This Court should decide this conflict and the important questions involved therein.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari to review the said judgment of the United States Court of Appeals for the Eighth Circuit in the case of Harry W. Schuermann, appellant, v. United States of America, appellee, be granted, to the end that the judgment and decision of said Court of Appeals for the Eighth Circuit in said cause may be reviewed by this Court as provided by law; that upon such review the judgment of the Court of Appeals for the Eighth Circuit be reversed; and that your petitioner have such other and further relief in the premises as may be meet and just.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals (R. 965) has not yet been reported. For the convenience of the Court, it is set out in full in the Appendix, infra (pp. 1a-11a). The opinion of the District Court is reported in 79 Fed. Supp. 247.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1). The judgment of the Court of Appeals affirming petitioner's conviction was entered May 10, 1949 (R. 976), and an order correcting the opinion and denying a timely petition for rehearing was entered June 8, 1949 (R. 1003). The petition for a writ of certiorari to review the judgment is filed within the time provided in Rule 37 (b) of the Rules of Criminal Procedure.

STATUTES AND RULE INVOLVED.

The pertinent portion of Section 145 (b) of Title 26, U.S.C., upon which this prosecution is based, the Act of March 16, 1878, 28 U.S.C., Sec. 632 (substantially present Section 3481 of Title 18, U.S.C.) and Rule 30 of the Rules of Criminal Procedure are set forth in the Appendix, infra (pp. 11a-12a).

STATEMENT OF THE CASE.

Petitioner was indicted in four counts in the District Court for the Eastern District of Missouri on charges of having wilfully attempted to defeat and evade the payment of income taxes for the years 1942, 1943, 1944 and 1945, in violation of Section 145 (b) of Title 26, U.S.C., by

filing a false return for each of the four years, wilfully understating his net income (R. 5-8). Bills of particulars were filed, stating that defendant was engaged in the policy numbers business, that he did not make available books and records from which his correct income could be determined, and that his correct income was determined on the basis of an increase in net worth, to which was added expenditures not included in that increase (R. 19-23).

Defendant was tried to a jury and convicted on all four counts of the indictment after his motions for judgment of acquittal were overruled (R. 38-39). His renewed motion for judgment of acquittal and alternative motion for new trial (R. 917-923) were overruled (R. 932) and petitioner was thereupon sentenced to a total of nine years' imprisonment (the last five of which were suspended) and fined a total of $40,000.00 (R. 933-936). On appeal to the Court of Appeals for the Eighth Circuit, the judgment was affirmed (R. 976).

The Government's evidence showed that petitioner was engaged in the policy, or numbers, business. But no evidence was introduced to show how petitioner operated said business nor the extent of his operations; only the name of the business being mentioned (R. 110). Petitioner's income tax returns prior to 1942 were introduced in evidence, and these returns reported net taxable income as follows: 1936, $3,660.80 (R. 67); 1938, $3,665.80 (R. 68); 1939, $4,831.30 (R. 70); 1940, $8,590.00 (R. 72); and 1941, $14,914.57 (R. 75).

Petitioner's 1937 tax return was not placed in evidence, although a return was made (R. 99).

No returns were found for petitioner in the search of the records for the years prior to 1936. According to the

rules of the Bureau of Internal Revenue, income tax returns are destroyed after a certain length of time (R. 99-100).

Petitioner's income tax returns for the years 1938, 1939 and 1940 were investigated in 1941 (R. 101). As a result of this investigation, deficiency assessments were agreed to (R. 103-104). These assessments were based on additional income for 1938 of $6,735.00, for 1939 of $6,394.36, and for 1940 of $4,759.14 (R. 105). The report of such investigation contained a capital gains schedule which showed that petitioner had realized the sum of $27,364.77 from a sale of corporate stocks. It also informed petitioner that he must maintain adequate accounting records (R. 138-146). No effort was then made to ascertain petitioner's net worth (R. 110).

Petitioner's income tax returns for the years 1942, 1943, 1944 and 1945 were prepared by a lawyer-accountant from columnar sheets furnished by petitioner showing the results of his business (R. 115-117). In August, 1945, the Government began an investigation of these returns (R. 603). The Revenue Agent making the investigation, Walter G. Ross, was unable to obtain any records from petitioner pertaining to his business (R. 578), and therefore made a determination of petitioner's income for the years in question upon "an increasing net worth and expenditures" method (R. 578). Ross found no evidence of income or of anybody paying any money to petitioner (R. 642-643), with the exception of non-taxable service disability income (R. 659-660, 751), which he "disregarded" in making his computations of cash available to petitioner for expenditure (R. 600). The investigation consisted of interviewing various persons shown on a Government chart (Exhibit 68,

R. 588), from which Ross ascertained the various loans, investments and other expenditures made by petitioner (R. 608).

In making his computations, Ross assumed that all of petitioner's expenditures, investments and loans came out of earned income. He testified that he based this assumption on his failure to develop any gifts or inheritance and on a statement petitioner made to him on August 9, 1945, that he had no "large" sums of currency on hand "at any time" (R. 609-610, 640-642).

No evidence was offered to establish petitioner's actual net worth as of December 31, 1941, the start of the four-year period involved in this prosecution or as of December 31 of each of the other years in question. The case was submitted to the jury on the theory that the expenditures and investments made by petitioner during each of the four years were attributable to and reflected his income for such year.

For 1942 petitioner reported a net taxable income, after deductions which were not questioned, of $15,513.94 (R. 79-82, Exhibit 6). The Government accountant computed petitioner's income for 1942 at $20,911.00. This sum was obtained by adding together the various loans, investments and expenditures listed on the Government chart, some of which had no support in the evidence, and assuming that such sum represented income earned during 1942. Non-taxable disability income [which amounted in the aggregate to over $11,000.00 (R. 751)] from which some of the expenditures might have been made was "disregarded" because it was non-taxable (R. 660), as was possible cash available from petitioner's reported earnings in 1941.

For the year 1943 petitioner reported that he had no net taxable income after deductions which were not ques-

tioned, including the charge-off of a bad debt of $15,450.00 (R. 83-87, Exhibit 7). The Government accountant computed petitioner's net income for 1943 at $32,525.17 on the same method used for 1942, but without deducting from the income the amount of the bad debt which was concededly worthless (R. 659). He also included in the 1943 net income a $10,000.00 loan made by petitioner to a friend in January, 1944, on the theory that this sum could not have been earned in 1944 and therefore must have been earned in 1943 (R. 637, 644).

For 1944 petitioner reported a net taxable income, after deductions, of $4,182.24 (R. 88-91, Exhibit 8). The Government accountant computed the petitioner's net income at $105,463.62 on the same method used for 1942. The 1944 total included the sum of $100,000.00 which was used for the purchase of capital stock in the St. Louis Finance Company, which was organized in March of 1944 (R. 176).

For 1945 petitioner reported a net taxable income, after deductions, of $17,295.06 (R. 92-95, Exhibit 9). The Government accountant computed petitioner's net income for 1945 at $85,107.84 by the same method used for 1942. This computation included an additional sum of $42,000.00 which was paid into the capital account of the St. Louis Finance Company (R. 453-454), the sum of $15,500.00 used for the purchase of petitioner's home in April, 1945 (R. 480-482), and the sum of $7,628.00 used for the purchase of a lot in Miami Beach (R. 191, 208).

For the purpose of showing intent, the Government showed, in addition to petitioner's failure to produce any financial records, that in 1943 petitioner rented a safe deposit box in a fictitious name and made various visits thereto (R. 398, 292). However, there was no evidence to show what, if anything, was kept in the box. The Govern-

ment also showed that petitioner's loans and investments were largely made by use of currency and that he purchased his home in the name of his father (R. 481).

Petitioner presented evidence to show that he had formerly operated handbooks, commencing in about 1922, with capital of $25,000.00 obtained from his grandmother, and that large sums of money were available to him from these operations (R. 694-697). Other evidence showed that prior to 1942, as well as thereafter, petitioner customarily kept substantial sums of currency on his person (R. 736, 725, 727-731). It was further shown that petitioner had committed himself in 1939 to finance the operations of a finance company, to be organized thereafter, in the amount of $150,000.00 (R. 737-738).

Petitioner did not testify on his own behalf. During the course of the argument of the Government attorneys, reference was made by those attorneys to evidence which had not been disputed or contradicted by any witness in the case (R. 832, 835, 863). Petitioner was the only person who could have disputed or contradicted the testimony. At the conclusion of the argument, and ninety-five minutes before the Court charged the jury, petitioner submitted twenty-two typewritten requests for instructions, which cover about fifteen pages of the typewritten transcript (R. 869-884). The second of these requested instructions is as follows:

> "The Court instructs the jury that the fact that the defendant has not testified in his own behalf does not create any presumption of guilt against him. The Court further instructs the jury that, under the law, the defendant does not have to prove himself innocent of the offenses of which he is charged in the indictment and that, in our courts of justice, the defendant has the right to stand on the presumption of innocence of the offenses of which he is charged and that he cannot

be convicted unless the Government has proven the offenses charged against him beyond all reasonable doubt, as the Court has defined that term to you. And the Court further instructs the jury that it must not permit the fact that defendant has not testified in his own behalf to weigh in the slightest degree against the defendant, nor should this fact be permitted to enter into the discussions or deliberations of the jury in any manner."

The trial judge criticised counsel for presenting the requests after the argument, but stated that he would grant some of the instructions after he had considered them (R. 868). The noon recess was then taken, and at the conclusion of the recess and immediately prior to charging the jury, the trial Court stated that he had gone over the instructions submitted to him and that he believed most of them were included in substance in his charge (R. 869). The charge (R. 884) did not include any instruction to the effect that the failure of defendant to testify on his own behalf should not create any presumption against him. Petitioner excepted to the charge "because it did not include an instruction that the fact that the defendant had not testified in his own behalf did not create any presumption of guilt" (R. 906).

SPECIFICATION OF ERRORS.

The Court of Appeals erred

1. In holding that the District Court did not err in denying the petitioner's motion for judgment of acquittal;

2. In failing to hold that the petitioner's motion for judgment of acquittal should have been given by the District Court;

3. In ruling that evidence of expenditures, loans and investments, without proof of net worth at the starting

point, was sufficient proof that petitioner had unreported income;

4. In holding that in determining whether the trial Court erred in ruling that the evidence was sufficient to submit to the jury, the opinion of the trial Court that the evidence is sufficient should be heavily relied on, and in relying heavily on such opinion in deciding that the evidence in this case was sufficient;

5. In holding that the District Court's denial of petitioner's request to instruct the jury that his failure to testify created no presumption of guilt does not entitle him to a reversal;

6. In failing to hold that it was error on the part of the District Court to deny petitioner's request to instruct the jury that his failure to testify created no presumption of guilt against him and that such error entitled petitioner to a reversal;

7. In holding that petitioner was not entitled, as a matter of right under the Act of March 16, 1878, to an instruction that his failure to testify created no presumption against him;

8. In holding that petitioner's failure to comply with Rule 30 of the Rules of Criminal Procedure deprived petitioner of his right to an instruction that his failure to testify shall create no presumption against him;

9. In ruling that petitioner's exception to the charge on the ground that it did not include an instruction that his failure to testify did not create any presumption of guilt did not advise the Court or counsel for the Government that petitioner had elected to have the jury so instructed;

10. In holding that petitioner's request that the Court instruct the jury that his failure to testify did not create

any presumption of guilt against him was belated, although it was made prior to the charge being given and after argument by Government counsel commenting on the failure to testify and the trial Court considered the instruction on its merits;

11. In holding that the failure of petitioner's counsel to furnish a copy of the requested instruction to the Government attorney's was a fatal error on their part, depriving petitioner of his right to the instruction;

12. In holding that to instruct the jury in accordance with the Act of March 16, 1878, would be of doubtful propriety unless petitioner chose to have the instruction given;

13. In ruling that an inference may be drawn from petitioner's tax returns for the years prior to 1942 that there was only a negligible likelihood that petitioner had accumulated a large surplus from his activities;

14. In holding that it may be inferred, on the basis of such inference that there was little likelihood that petitioner had accumulated a large surplus, that disbursements thereafter made were attributable to and reflected current income;

15. In holding that in an income tax evasion case a lesser quantum of proof is permissible than in other criminal prosecutions.

ARGUMENT.

I.

The Court of Appeals for the Eighth Circuit in this case has decided a very important question relating to the quantum of proof necessary to prove the receipt of unreported income, in prosecutions under Section 145 (b) of the Internal Revenue Code. The issue before the Court was whether

the net worth-expenditure method of computing income could be utilized in a case where the Government fails to establish the defendant's net worth at the beginning of the taxable period. The Court of Appeals decided this issue in the affirmative, its decision being directly contrary to the decisions of the Court of Appeals for the Fifth Circuit in **J. Baker Bryan, Sr., v. United States** (not yet reported) and the Court of Appeals for the Seventh Circuit in **United States v. Chapman,** 168 F. (2d) 997. This conflict should be settled; and it should be settled by reversing the decision of the Eighth Circuit in this case.

Even were there no conflict of decisions, the importance of the questions involved in this issue makes it in the public interest that this Court authoritatively decide the issue. The problem is one which will recur time and again in income tax evasion prosecutions. In fact, the decision in this case is even now being used by the Government in many cases, the prosecution of which had been held up pending the outcome of this case.

The net worth-expenditure method of computing income is being increasingly utilized by the Government both in civil and criminal cases to prove that the taxpayer received unreported income. This method is a means of proving income circumstantially, based on the theory that if the net worth of the taxpayer increases during a given year an inference may be drawn that the sum of this increase and proved expenditures not included therein reflects income received in such year. In this case the bills of particulars (R. 19-23), by which the Government is bound, stated that petitioner's income was determined on the basis of an increase in net worth. Whether such a method should properly be used in a criminal case, where guilt must be proved beyond a reasonable doubt, need not be decided at this time, for the reason that the proof in this case did not

accord with the theory. There was no proof of an **increase** in net worth, since there was no proof of petitioner's actual net worth at the **beginning** of the taxable period.

If the decision is permitted to stand, it means that for all practical purposes an income tax evasion case may be proved merely by showing that the defendant spent and invested in a given period more than his reported net taxable income for such period. On the basis of no more than a showing of that nature, severe punishment for alleged tax evasion may be meted out, just as in the instant case the petitioner was sentenced to nine years (of which five were suspended) and fined $40,000.00.

Although it is necessary to prove the further element of wilfulness, there are a few cases in which a Court will not hold that evidence has been presented from which the requisite wilfulness may be inferred. For example, with respect to the count involving 1942 in the instant case, the only evidence of alleged wilfulness was petitioner's failure to produce records and his use of currency in handling his transactions.

But in any case, without regard to the question of wilfulness, it is nevertheless essential to prove, as a separate element of the offense, and the Court of Appeals properly so held, that the income tax returns filed by the taxpayer were in fact false in that taxable income received by him was not included therein. In this case the Government offered no evidence of income or of the operations of petitioner's business, and if this decision stands it means the Government will no longer be required to present such proof. The theory of the Government, which was sustained by the Court of Appeals as proper, was that proof of expenditures, loans and investments in excess of reported net taxable income constituted proof that petitioner had

received unreported taxable income, even though the Government failed to establish the petitioner's net worth at the commencement of each taxable period.

It is the position of petitioner that the Government's burden of proving that a defendant has received unreported income may not properly be satisfied by simply proving that his investments and expenditures during the tax period were in excess of his reported net taxable income. The Court of Appeals conceded that petitioner's contention was "not without substance" but nevertheless held that proof of net worth at the starting point could be dispensed with. The decision of the Court of Appeals substitutes conjecture and speculation for proof. Under that decision a jury is permitted to infer, without evidence establishing the taxpayer's net worth, that loans and investments in excess of reported taxable income represent an **increase** in his net worth, and to infer, on the basis of such **inference**, that the funds so loaned and invested during the tax year came from taxable income earned in the year of disbursement.

In the case of **J. Baker Bryan, Sr., v. United States,** not yet reported, the Court of Appeals for the Fifth Circuit, on May 13, 1949, held as follows:

> "The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate."

In **United States v. Chapman,** 168 F. (2d) 997, the Court of Appeals for the Seventh Circuit held that in a net worth case the starting point must be based upon a solid foundation. The decision in the instant case dispenses with a solid foundation as a starting point. It dispenses with

any proof of net worth at the beginning of the tax period. The decision should be reviewed and reversed.

The reason a solid foundation is necessary to prove a net worth case would seem to be obvious. Investments and loans are usually made out of accumulated capital rather than out of current income. Unless one knows how much a person is worth at the beginning of a year, it is no more than speculation to assume that the amount spent or invested during such year represents his net income for such year. In fact, the Court of Appeals expressly held that the government's evidence did not exclude the possibility that the investments and loans were made out of substantial accumulations of capital.

All that happens when a loan or investment is made is a change in the **form** of existing capital assets. The **amount** of such assets remains unchanged. Hence, proof of the making of the loan or investment proves only that the lender or investor was then in possession of sufficient funds to make the disbursements. It does not prove that he had currently received that amount as income. That is why the essential fact in any net worth case must be the taxpayer's net worth at the starting point, so that an inference may be drawn from proof of an increase in his net worth that he received taxable income. Otherwise, how could it be known whether loans or investments made by the taxpayer represent an increase rather than a change in the form of his capital assets or net worth? The inference of income in net worth cases is drawn from an established increase in a taxpayer's net worth; but where, as here, the original net worth is not shown, there is no basis for a finding that loans and investments represent an increase in net worth.

The Court of Appeals has held in this case that a solid starting point establishing net worth may be dispensed with, and that in lieu of proving net worth at the starting point there may be substituted an inference, drawn by the Court (although not submitted to the jury or referred to by the trial court) from the petitioner's tax returns for the years prior to 1942, that "the likelihood of his having accumulated a large surplus from his activities was negligible." But this inference cannot constitute a solid foundation in a net worth case within the holding of **United States v. Chapman,** supra, or **J. Baker Bryan, Sr., v. United States,** supra. Even if the inference could properly be drawn in this case from the prior tax returns that there was only a "negligible" likelihood that petitioner had accumulated "a large surplus," such inference may not be used as the basis for drawing the further inference of the ultimate fact to be established, namely, that loans, investments and expenditures thereafter made are attributable to and reflect current income. The rule is well established that it is not permissible to base one inference upon another. **United States v. Ross,** 92 U. S. 281, and **Manning v. John Hancock Life Insurance Co.,** 100 U. S. 693. There are numerous decisions of the Courts of Appeals to the same effect.

But even the inference drawn by the Court of Appeals is not a proper one in this case. In order to draw the inference, the Court necessarily assumes that petitioner filed no returns in the years prior to 1936, the very years in which petitioner's evidence showed that he had accumulated well over $100,000.00 (R. 694-697). The Court further necessarily assumes, without evidence, that the tax return for 1937, which the Government witness stated had been destroyed under Internal Revenue Rules (R. 99) and therefore was not in evidence, reported only a "negligible"

amount of income. Without the 1937 return, how can any inference whatever be drawn respecting petitioner's capital accumulations? The Court of Appeals also overlooks the fact that tax returns report only income, not capital or cash available for expenditure. Moreover, no "large surplus" would be needed to make the expenditures for 1942 and 1943. Each year, of course, represented a separate offense in the four-count indictment.

Petitioner submits that whether or not the inference is permissible, it nevertheless may not be used as a substitute for a solid foundation consisting of proof of net worth at the starting point, in a case tried on the theory that loans, investments and expenditures are attributable to and reflect current net taxable income.

As the compelling reason for its holding that the District Court did not err in overruling petitioner's motion for judgment of acquittal, the Court of Appeals enunciated a doctrine which represents a startling innovation in the administration of criminal justice. It held that because of the assumed difficulty in obtaining proof of tax evasion, appellate courts must "rely heavily upon the sound judgment of the trial courts in appraising the sufficiency of the evidence to warrant submission of a tax evasion case to a jury".[3] Petitioner submits that in so ruling, the Court of Appeals has completely departed from accepted standards of law governing appeals and virtually abdicated its duty as an appellate court.

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[3]That the judgment of the Trial Court was not "sound" in the instant case is evidenced by his memorandum opinion overruling petitioner's motion for a new trial (R. 931). Although conceding petitioner's contention that income may not be proved by expenditures alone, the Court states that there is "other evidence". Yet the only "other evidence" the Court mentions is that bearing on the question of wilfulness, an element of the offense distinct from proof of receipt of unreported income.

The sufficiency of the evidence to warrant submission of a case to the jury is a question of law. Petitioner's appeal brought before the Court of Appeals the question of whether the District Court had erred in appraising the sufficiency of the evidence. Yet the Court of Appeals has ruled that in determining whether the trial court committed error in deciding this point, it must, and does, rely heavily upon the trial court's opinion that it did not commit error. The effect of this ruling is to make the trial court, for all practical purposes, the court of last resort in tax evasion cases and thereby deprive an appellant of his right of appeal in such cases.

The foregoing doctrine is limited by the Court's opinion to tax evasion cases and is made applicable to such cases in order that "the skill of the tax evader in concealing income" may not "become 'an invincible barrier to proof'." This can only mean that the Court of Appeals starts with the premise that a person charged with tax evasion is presumptively guilty of such offense and presumes from the failure of the Government to present any proof of income, or of income in excess of that reported, that the petitioner has skillfully concealed his income.

The Court of Appeals cites, in support of the foregoing ruling, the decision of this Court in **United States v. Johnson**, 319 U. S. 503. But in the **Johnson** case there was substantial proof of record that the defendant concealed his income and business behind "screens". Here there is no such evidence. All that appears is expenditures in excess of reported income. Moreover, the **Johnson** case does not hold that a Court of Appeals is not required to appraise the sufficiency of the evidence independently. All that this Court there held was that in reviewing a case on certiorari, after the appellant has already had his day in the appellate court, this Court may properly rely on the

fact that **both** the trial court and the Court of Appeals have held the evidence sufficient. This necessarily assumes that the sufficiency of the evidence has actually been considered and determined by the Court of Appeals independently of the opinion of the trial court. In those cases in which the Court of Appeals has not in fact independently appraised the sufficiency of the evidence, even this Court will not hesitate to review the facts. See, for example, **Mortenson v. United States,** 322 U. S. 369.

The **Johnson** case does not hold that income tax evasion cases stand on any different footing than other criminal cases insofar as concerns the quantum of proof necessary to sustain convictions or the relaxation of safeguards adopted for the protection of an accused intended to prevent innocent persons from being convicted. "Difficulty of proof is no substitute for actuality of proof." **United States v. Buchalter,** 2 Cir., 88 F. (2d) 625. But in truth there is no inherent difficulty in proving tax evasion where the facts justify prosecution. Examples of such cases are **United States v. Johnson,** 319 U. S. 503; **United States v. Miro,** 2 Cir., 60 F. (2d) 58; **United States v. Potson,** 7 Cir., 171 F. (2d) 495; and **Guzik v. United States,** 7 Cir., 54 F. (2d) 618.

This Court should settle this important question and hold that in tax evasion cases, as in all others, the defendant is entitled to the presumption of innocence, that the Government must prove its charges by substantial evidence, and that the defendant may not be deprived of his right of appeal by indirection.

Petitioner does not contend that the Government is required to establish the exact amount of unreported income. What he does contend is that it must prove by substantial evidence that there actually was some unreported income.

This ultimate fact must not be conjectured, assumed or inferred from other insubstantial inferences. Even in civil cases, the rule is that it is "absolutely necessary" to establish net worth at the beginning of the period in question. See **James Q. Whittemore,** Tax Court Docket No. 13421, dated November 16, 1948.

Petitioner submits that where, as here, there is no established or admitted net worth at the commencement of the tax period, the Government has failed to prove the receipt of unreported income on the net worth-expenditure method. This Court should authoritatively so rule.

II.

The Court of Appeals in this case held that the denial of petitioner's request that the Court instruct the jury that petitioner's failure to testify does not create any presumption of guilt against him did not entitle petitioner to a reversal. In so ruling, the Court of Appeals has failed to follow the applicable decision of this Court in **Bruno v. United States,** 308 U. S. 287, and in any event has decided a question of great importance in the administration of criminal justice which should be settled definitely by this Court.

In the **Bruno** case, this Court held that the Act of March 16, 1878, gave a defendant the indefeasible right to have the jury told that his failure to testify creates no presumption against him, and that it is prejudicial error to disregard such right. The statute expressly provides that no presumption shall be created against a defendant from his failure to testify, and this Court held that by such legislation Congress impliedly directed the trial judge to exercise his "traditional duty in guiding the jury by in-

dicating the considerations relevant to the latter's verdict on the facts," including the fact of the defendant's failure to testify.

If, as the **Bruno** case holds, a defendant has the indefeasible right to have the jurors informed that they may not draw any presumption against defendant from his failure to testify, and if it is the duty of the trial court to give such an instruction, then it follows that a mere technical non-compliance with Rule 30 of the Rules of Criminal Procedure should not have the effect of destroying the defendant's indefeasible right and abrogating the Court's duty. It will be noted that when the instructions were presented, the trial court stated that **he would grant some of them** (R. 868). It is submitted, therefore, that petitioner's technical failure to comply with Rule 30 should not be held to excuse the trial court (whose opinion shows that he is not in sympathy with what he calls the "paradoxical" rule of the **Bruno** case) in denying an indefeasible right and failing to comply with his duty under the statute. Petitioner's substantial rights have been prejudiced by the failure of the trial judge to instruct the jury that they may draw no presumption from his failure to testify no less than the substantial rights of Bruno were prejudiced. Petitioner was entitled to the instruction as a matter of right, under the decision of this Court in the **Bruno** case.

The language used in the **Bruno** case is susceptible to the construction that whether the instruction should be given is a matter of choice on the part of the defendant. The Court of Appeals, therefore, held that it is necessary for a defendant to "advise" the trial court and Government counsel that he has elected to have the Court so instruct the jury. If such an election is in fact necessary,

then it is submitted that making the request for such an instruction prior to the charge being read to the jury, and excepting to the charge on the ground that it did not include an instruction "that the fact that defendant had not testified in his own behalf did not create any presumption of guilt" sufficiently "advised" the trial court, just as it would any other intelligent person, that defendant had chosen to have such an instruction given.

The theory of the Court of Appeals was that it would be of "doubtful propriety" (the expression the Court originally used was "error") to give such an instruction without request. In **Smith v. United States,** 112 F. (2d) 217, the Court of Appeals for the District of Columbia held that such an instruction was properly given on the Court's own motion. The same ruling was made by the Court of Appeals for the Fifth Circuit in **Chadwick v. United States,** 117 F. (2d) 902. The instant decision is in conflict with the decisions in those cases.

Petitioner respectfully submits that it is entirely proper for the trial Court to give such an instruction on its own motion, and that in any event where, as here, a request for such an instruction is made before the Court reads its charge to the jury it is prejudicial error to deny such request.

The Court of Appeals cited Rule 30 of the Rules of Criminal Procedure to justify the denial of the request. It is true that the rule was violated because the instruction was submitted after the argument instead of before. But it was submitted ninety-five minutes before the charge was given to the jury and the trial judge considered the request on its merits (R. 868, 869). In his memorandum opinion, he indicates clearly that he did not believe it correctly stated the law (R. 931). In this he was in error. The District Court

did not at the trial refuse to give the instruction on the grounds on which his ruling has been sustained. Surely, the action of the trial Court in considering the request under these circumstances should be held to constitute a waiver of the application of Rule 30, even if it otherwise should be held to apply. So too, the assumed failure of petitioner's counsel to submit a copy of the request to the Government counsel should not be held to be a "fatal error" on their part to the extent that the petitioner is thereby deprived of his "indefeasible" right to the instruction. Although Government counsel were present when the instruction was requested, the record shows that they made no request for a copy at the time; and no objection to such effect was then made either by counsel or the Court. If the point had any validity, it should be held to have been waived by the Government.

The Court of Appeals has held that counsel should have called the **Bruno** case to the Court's attention. But counsel could not have known, if it were a fact, that the trial Court was not aware either of the statute or of the **Bruno** case. Moreover, in the **Bruno** case, the denial of such a request was held error, although the request was made after the charge was read to the jury,[4] and there was no prior **Bruno** case to call to the Court's attention. Obviously, the trial Court in the **Bruno** case had far less time to grasp the significance of the request, and the statutory necessity therefor, than did the trial Court in the instant case, to whom the request was presented long before he read his charge to the jury.

The instant case is the kind of case in which such an instruction should be given by the Court whether requested by defendant or not. The Government's case was based on

[4]The *Bruno* case was tried before the Rules of Criminal Procedure became effective.

the inference which the jury was asked to draw that the petitioner's loans, investments and expenditures were made out of current net income. This theory of the case in effect placed the burden on petitioner to satisfy the jury as to the source of the money he expended and the year in which it was received. The very nature of this case is such that a presumption of guilt might be drawn by the jury from defendant's failure to testify, so that in the interest of justice to the defendant it was imperative that the trial Court comply with the Congressional mandate and inform the jury that no such presumption may be drawn. When to the foregoing is added the fact, which the Court of Appeals fails to mention, that the argument of the Government's counsel (R. 832, 835, 863) could have been construed by the jury as commenting on petitioner's failure to testify, it is submitted that Rule 30 has no application, and that the request for such an instruction made after the conclusion of the argument was timely. The failure to give the instruction constituted prejudicial error.

Rule 30 should not be given the harsh, unyielding application which the Court of Appeals has given it in this case. The Rule should not be held to justify the denial of the requested instruction (which the record shows was not denied by the Court below on such ground) where, as here, the trial Court was fully apprised, before reading his charge, of the petitioner's desire that the jury be told that his failure to testify created no presumption against him. Even the Court of Appeals for the Eighth Circuit was not so exacting in its construction of the similar Rule 51 of the Rules of Civil Procedure, **Peterson v. Sheridan,** 115 F. (2d) 121.

This Court should settle once and for all the important question of whether a defendant has the right to an instruction that his failure to testify creates no presumption

against him, when he requests such an instruction prior to the charge being read to the jury and excepts to the charge because it fails to include such an instruction.

Rule 52(a) of the Rules of Criminal Procedure provides that any error or defect which does not affect substantial rights shall be disregarded. The error of petitioner's counsel in requesting the instruction after the argument instead of before is of that character. It is submitted that the action of the trial Court in failing to give the instruction is a plain error affecting petitioner's substantial rights, within Rule 52(b), under the **Bruno** case.

This Court should decide whether technical compliance with Rule 30 by counsel for an accused is of greater importance than compliance by the trial Court with the direction of Congress expressed in the Act of March 16, 1878.

CONCLUSION.

Petitioner respectfully submits that because of the important questions involved in this case and the conflict of decisions, a writ of certiorari should be granted.

Respectfully submitted,

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ROBERT KRATKY,
MORRIS A. SHENKER,
JOSEPH NESSENFELD,
Attorneys for Petitioner.

APPENDIX

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
for the Eighth Circuit

No. 13798

Harry W. Schuermann, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 10, 1949]

Mr. Joseph Nessenfeld (Mr. Jerome F. Duggan, Mr. Robert Kratky and Mr. Morris A. Shenker were with him on the brief) for Appellant.

Mr. Drake Watson, United States Attorney (Mr. David M. Robinson, Assistant United States Attorney, was with him on the brief) for Appellee.

Before Sanborn, Thomas, and Johnsen, Circuit Judges.

Sanborn, Circuit Judge, delivered the opinion of the Court.

The defendant (appellant), by an indictment in four counts, was charged with having wilfully attempted to defeat and evade the payment of federal income taxes by filing a false return for each of the years 1942, 1943, 1944 and 1945.[1] He entered a plea of not guilty. The case was

[1]The charges were based on Section 145(b) of Title 26, U.S.C.A. Int. Rev. Code, which, so far as pertinent, provides:

"* * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

tried to a jury, which returned a verdict of guilty upon all counts. Sentence was imposed upon the verdict, and the defendant has appealed. He asserts that the Court should have directed a verdict of acquittal upon the ground that the evidence was insufficient to sustain his conviction, and that errors of law were committed during the trial which entitle him to a reversal.

The Government attempted to prove (1) that the defendant filed a false income tax return for each of the years covered by the indictment, and (2) that he did so wilfully in an attempt to defeat or evade payment of a part of his income tax. If the Government's evidence was sufficient to make the question of the alleged falsity of the defendant's returns one of fact for the jury, the defendant was not entitled to a directed verdict. We say this because the evidence disclosed the usual badges or indicia of the deliberate concealment of income, namely: (1) intentional failure to maintain financial records; (2) a much visited safety deposit box, rented under an assumed name; (3) the use by the defendant, in his dealings, of large sums of currency; and (4) purchases of property by the defendant in others' names.

It is the position of the defendant that the Government completely failed to produce any substantial evidence that he had any taxable income in excess of that reported by him or that he owed any more taxes than he paid.

The defendant is a married man, who, for a number of years, was engaged in operating in St. Louis, Missouri, a policy or numbers business, a form of lottery or gambling in which numbered tickets are sold and some ticket holders evidently win or hope to do so. The business is illegal in Missouri, but is apparently lucrative if well managed. (See **United States v. Miro**, 2 Cir., 60 F. (2) 58.] It constituted

the defendant's only visible means of support and income during the years in suit.

The defendant's income tax returns for the years 1936, 1938, 1939, 1940 and 1941 reported net income and tax liability as follows:

	Net Income	Tax Liability
1936	$ 3,660.80	$ 90.55
1938	3,665.00	91.94
1939	4,831.30	73.93
1940	8,590.00	335.10
1941	14,914.57	2,578.80

In 1941, the taxing authorities investigated the defendant's returns for the years 1938, 1939 and 1940. As a result of this investigation, deficiency assessments were agreed to for those years. The assessments were based on additional income for 1938 of $6,735.00, for 1939 of $6,394.36, and for 1940 of $4,759.14. The Revenue Agent who made the examination determined that in 1938 defendant's income from his policy business was $10,400.00, that in 1939 it was the same amount, and that in 1940 it was $13,352.70. The report of examination informed the defendant that he must maintain adequate accounting records.

The defendant's returns for 1942, 1943, 1944 and 1945 were prepared by a lawyer and accountant from columnar sheets, furnished by the defendant, purporting to show the results of his business. These returns showed the defendant's net income and tax liability to be as follows:

	Net Income	Tax Liability
1942	$15,513.94	$4,280.41
1943	none	none
1944	3,682.24	645.55
1945	17,295.06	5,851.38

According to the Government accountant who investigated the defendant's returns for the years in suit, the

corrected net income and tax liability of the defendant were as follows:

	Corrected Net Income	Tax Liabiilty
1942	$ 20,911.00	$ 6,983.91
1943	32,525.17	14,811.52
1944	105,463.62	74,441.53
1945	85,107.84	56,161.54

This computation is based upon the theory that on December 31, 1941, the defendant had no substantial capital and that during the subsequent four years his expenditures and investments were attributable to and reflected his current income. The method used by the Government for reconstructing the defendant's probable income for the years in question is called the "increasing net worth and expenditures" method. Its use in this case was necessitated by the fact that the defendant had no record of his receipts. He asserts that, before computations based upon this method could be accorded probative value, there would have to be substantial evidence of what the sum total of his assets was on December 31, 1941, and that this has merely been assumed and not proven. In the defendant's brief, it is said:

> "In the instant case, there was no proof whatever of income, and no proof of actual net worth. Yet the jury was permitted to infer, without evidence establishing net worth, that the loans and investments in excess of reported taxable income represented an **increase** in net worth and to infer on the basis of such inference that the funds so loaned or invested in any year came from taxable income **first earned** in that year. Upon these inferences, and without a scintilla of proof of income, defendant was convicted, sentenced to a total of nine years[2] and fined $40,00."

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[2]The defendant was placed on probation with respect to five years of the sentence of imprisonment.

The contention of the defendant as to the soundness of the Government's computations is not without substance. The Government's case is based largely upon the theory that proof of expenditure is, under the circumstances of this case, proof that the defendant, in each of the years involved, had more income than he reported. The evidence of the Government does not exclude the possibility that the defendant had some substantial accumulation of capital on December 31, 1941, or that sometime, somehow and somewhere he acquired a large amount of capital out of which he made the loans, investments and expenditures which the Government contends reflect income.

While the Government had the burden of proof, it was not required to make a perfect case or to prove the defendant guilty to a mathematical certainty. The Government did not have to establish the exact amount of unreported income of the defendant. **United States v. Johnson,** 319 U.S. 503, 517. Evidence which, if unexplained and uncontradicted, will justify a conclusion that a taxpayer had income which he deliberately failed to include in his return, is enough to take a case such as this to the jury. Compare, **Affronti v. United States,** 8 Cir. 145 F. (2d) 3, 6, and **Guzik v. United States,** 7 Cir., 54 F. (2d) 618, 620.

We think it reasonably may be inferred, from the defendant's returns for the years prior to 1942, that the likelihood of his having accumulated a large surplus from his activities was negligible. One can believe that his business, like many other enterprises, legal and illegal, was a beneficiary of the prosperity of the war years, and that his expenditures kept pace with his income. If the skill of the tax evader in concealing income is not to become "an invincible barrier to proof" (**United State v. Johnson,**

supra, page 518 of 319 U.S.), the federal appellate courts will have to rely heavily upon the sound judgment of the trial courts in appraising the sufficiency of the evidence to warrant submission of a tax evasion case to a jury, and upon the fairness and common sense of juries in determining guilt or innocence when such cases are submitted to them. See **United States v. Johnson, supra,** pages 519-520 of 319 U.S.

We conclude that the District Court did not err in denying the defendant's motion for a verdict of acquittal.

Other errors asserted by the defendant relate to the Court's failure to give certain instructions requested by the defendant.

The case was argued to the jury during the morning of July 1, 1948. The arguments were concluded at 12:55 p.m. At that time, defendant's counsel presented to the Court twenty-two typewritten pages of requested instructions. No copies of the requests were furnished counsel for the Government. The Court excused the jury until 2:30 p.m., and the following colloquy took place between the Court and counsel for the defendant:

"The Court: Let's let the record show that after argument is concluded, the defendant submits his requests. But that is not right. You gentlemen know the rules. This is not the first criminal case you tried.

"Mr. Duggan: First one I tried under the rules.

"The Court: That rule has been in effect for years. In other words, the Court has to have some time to examine instructions. If it was not for taking a noon recess, I would instruct the jury now. I asked you for your requests yesterday at noon.

"Mr. Kratky: Well, I understood the request for the——

"The Court: I will grant some of them, but I have no time now to consider them. What do you want me to do, take my noon recess and study these requests?

"Mr. Kratky: No, but I understand the Court called for the instructions after the——

"The Court: No. You read the rules. They require they be given the Court a sufficient length of time before the arguments start so the Court can go over them, and now you waited until the arguments are in.

"Mr. Kratky: I did not do that purposely, your Honor.

"The Court: I am not saying you did it purposely. I am just saying what the record shows you have done, and why I cannot give these instructions the attention they should have."

At 2:30 p.m., when the trial was resumed, the Court said to counsel:

"I have gone over the twenty-two instructions submitted to me just before the noon recess by defendant. I think most of them are included in my charge, if not in the language they are requested, the substance of them."

Among the twenty-two instructions requested was one reading as follows:

"The Court instructs the jury that the fact that the defendant has not testified in his own behalf does not create any presumption of guilt against him. The Court further instructs the jury that, under the law, the defendant does not have to prove himself innocent of the offenses of which he is charged in the indictment and that, in our courts of justice, the defendant has the right to stand on the presumption of innocence of the offenses of which he is

charged and that he cannot be convicted unless the Government has proven the offenses charged against him beyond all reasonable doubt, as the Court has defined that term to you. And the Court further instructs the jury that it must not permit the fact that defendant has not testified in his own behalf to weigh in the slightest degree against the defendant, nor should this fact be permitted to enter into the discussions or deliberations of the jury in any manner."

The charge of the Court relative to this same subject matter contained the following:

"The defendant is presumed to be innocent, and this presumption abides with the defendant at all stages in this trial, and this assumption continues until the evidence proves the defendant guilty beyond a reasonable doubt.

"And the burden of convincing you of the guilt of the defendant rests on the Government solely and not on the defendant in any respect whatsoever.

* * * * * * * * *

"The burden of proof rests upon the Government throughout the case and never shifts, to sustain the charge as set forth in each count; and under the law governing this case, the presence of such testimony in the record of the character I have referred to puts no burden on the defendant to explain where or how he obtained the money so used by him."

In the case of **Bruno v. United States,** 308 U. S. 287, the Supreme Court ruled that it was fatal error for the trial Court in that case to refuse to give the substance of the following instruction requested by Bruno:

"The failure of any defendant to take the witness stand and testify in his own behalf, does not create any pre-

sumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

It is obvious that, in the instant case, the instruction requested by counsel for the defendant was based upon the Bruno case, although it was not called to the trial Court's attention.

Rule 30 of the Rules of Criminal Procedure for the United States District Court, 18 U.S.C.A., provides:

"At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

This rule is the law. In our opinion, it was intended to prevent the very thing that occurred in this case, namely, the presentation to the trial Court, after the case was closed and the Court had formulated its charge, of a great mass of requested instructions, not for the purpose of assisting the trial Court, but for the purpose of having something to argue about in case of a conviction.

The failure to present the United States Attorney with copies of the requests was a fatal error on the part of de-

fendant's counsel. One of the most important duties of counsel for the Government in the trial of a criminal case is to keep error out of the record, and thus to prevent the frustration of the Government's efforts to secure a valid conviction. In the instant case nothing was done by defendant's counsel to put Government counsel on notice that the defendant had elected to have the Court instruct the jury that his failure to testify created no presumption of guilt. Counsel knew, of course, that, unless the defendant chose to have that instruction given, the giving of it would be of doubtful propriety, since it would call the jury's attention to the defendant's failure to testify. **Wilson v. United States,** 149 U. S. 60, 65. It is true that, at the conclusion of the Court's charge, counsel for the defendant took an exception "because it did not include an instruction that the fact that the defendant had not testified in his own behalf did not create any presumption of guilt." That exception, however, did not advise the Court or counsel for the Government that the defendant had, pursuant to the rule of the Bruno case, elected to have the Court so instruct the jury.

Counsel for the defendant, in belatedly presenting their requests for instructions, may not have intended to set a trap for the Court and for opposing counsel, but that is exactly what they did. They gave the Court an inadequate opportunity to study their requests. They gave counsel for the Government no opportunity at all to consider them. They did not direct the Court's attention to the rule announced in the Bruno case and its applicability to the specific request based on that case.

Under the circumstances, we hold that the District Court's denial of the defendant's request to instruct the jury that his failure to testify created no presumption of guilt, does not entitle him to a reversal of the judgment.

The other requests for instructions which the defendant contends should have been given, have the same procedural infirmity as the one which we have discussed. Moreover, the failure to give them, had they been appropriately presented to the Court for consideration, would, we think, not have been error. The charge of the Court was fair, and adequately covered the issues tried.

The contention that the trial judge was hostile and unfair to the defendant during the trial is not substantiated by the record.

The judgment is affirmed.

Section 145(b) of Title 26 U. S. C., so far as is pertinent, provides as follows:

> " * * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisonment for not more than five years, or both, together with the costs of prosecution."

The Act of March 16, 1878 (28 U. S. C. Section 632) provides as follows:

> "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

Rule 30 of Federal Rules of Criminal Procedure provides as follows:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

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In the Supreme Court of the United States

October Term, 1949

No. 172

HARRY W. SCHUERMANN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported in 79 F. Supp. 247. The opinion of the Court of Appeals is set forth in the appendix to petitioner's brief and is reported in 174 F. 2d 397.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1949. (R. 976.) The petition for rehearing was denied on June 8, 1949. (R. 1003.) The petition for a writ of certiorari was filed July 6, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254. See also Rules

37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the conviction.

2. Whether, in the circumstances here present, the trial court erred in failing to instruct the jury, *in haec verba,* that the fact that the defendant had not testified in his own behalf did not create any presumption of guilt against him.

STATUTE AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

(26 U.S.C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

> RULE 30. INSTRUCTIONS. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

The petitioner was charged in a four-count indictment returned in the Eastern District of Missouri with having wilfully attempted to evade and defeat his income taxes for the calendar years 1942, 1943, 1944, and 1945, by filing false and fraudulent tax returns for each of those years, in violation of Section 145(b) of the Internal Revenue Code. (R. 5-9.) The indictment alleged that the petitioner had understated his income in the total amount of $206,344.39 and his tax liability in the

total amount of $140,824.19 for the four-year period.[1]

After trial by jury, the petitioner was convicted and was sentenced to nine years' imprisonment, five years of which were suspended, and was fined a total of $40,000. (R. 933-934.)

During the period in question, petitioner illegally operated a form of lottery known as the "policy" or "numbers" game. (R. 82, 84, 89, 110, 117, 710.) His returns were prepared by a lawyer-accountant from memoranda furnished by the petitioner, which showed the purported ultimate results of his operations. (R. 113-118.) When interviewed by the investigating agents, petitioner stated that he had

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[1] The alleged understatement of tax and income by years is as follows:

NET INCOME

Year	*Per Return*	*Per Indictment*	*Difference*
1942	$15,513.94	$ 20,589.05	$ 5,075.11
1943	(Loss of $1,354.94)	32,945.47	32,945.47
1944	3,682.24	109,064.60	105,382.36
1945	17,295.06	80,236.51	62,941.45
Total	$36,491.24	$242,835.63	$206,344.39

TAX

Year	*Per Return*	*Per Indictment*	*Difference*
1942	$ 4,280.41	$ 6,816.88	$ 2,536.47
1943	None	15,080.00	15,080.00
1944	645.55	77,754.43	77,108.88
1945	5,851.38	51,950.22	46,098.84
Total	$10,777.34	$151,601.53	$140,824.19

no books and records, and he produced none for examination by the agents. (R. 577.) In a prior investigation of petitioner's tax liability for the years 1938, 1939, and 1940, petitioner was informed that he was required to maintain adequate accounting records of his operations. (R. 106, 138.)

The evidence showed that in each of the years 1942, 1943, 1944, and 1945 the petitioner expended and invested sums far in excess of his reported income (R. 64-592)—the excess for the four-year period amounting to approximately $208,000 (R. 588). As tending to preclude the possibility that such expenditures and investments were made out of prior accumulations of capital, it was shown that petitioner filed no income tax-returns for the years prior to 1936. (R. 99-100.) The investigating revenue agent testified that he had made an analysis of net taxable income reported by petitioner for the years 1936 through 1941 and had found that the reported income was barely sufficient to cover petitioner's personal expenses and a $15,450 loss sustained by petitioner on an investment made during that period. (R. 610-611.) He further testified that his investigation had disclosed no gifts, inheritances, or loans to petitioner (with the exception of one loan of $1,500) (R. 637-642); and that petitioner, in an interview with the agent on August 9, 1945 (R. 575), had stated, among other things, that "he had no large sums of currency on hand at any time" (R. 577-578). There was also evidence that for a portion of the year 1944 petitioner had

periodically furnished large sums, consisting chiefly of currency, to a third-party nominee who deposited the money in a "special" bank account and then drew checks on the account payable to the officer of a corporation which petitioner controlled.[2] (R. 261-276, 328-347.)

Petitioner's tax return for 1936 reported a net income of $3,660.80 (R. 67); for 1938 of $3,665 (R. 68); for 1939 of $4,831.30 (R. 70); for 1940 of $8,590 (R. 72) and for 1941 of $14,914.57 (R. 75) —a total of $35,661.67. The tax return for 1937 had been destroyed (R. 99) and, upon the objection of petitioner, the court refused to admit evidence of the amount of the tax assessment for that year (R. 596-598) from which 1937 income could have been determined. However, one of petitioner's witnesses, an accountant, stated that he had determined from the retained copy of petitioner's 1937 return that the cash available to petitioner from his reported 1937 income, after payment of taxes but before allowance for living expenses, was $2,984. (R. 742, 746.) As a result of the prior investigation of petitioner's tax liability for the years 1938, 1939, and 1940, the Bureau of Internal

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[2] The amounts and dates of the various deposits were as follows: February 10, 1944, $5,000 currency; March 15, 1944, $3,000 currency; March 22, 1944, $8,000 currency; March 23, 1944, $2,000 mostly in checks; April 10, 1944, $5,000 in checks; May 19, 1944, $700 in currency; June 27, 1944, $800 in checks; July 6, 1944, $40 in currency; July 22, 1944, $100 in currency; August 26, 1944, $100 in currency; September 28, 1944, $3,500 in checks; and October 28, 1944, $300 in checks. (R. 263,275.)

Revenue determined that there was a total unreported net taxable income for those three years of $17,888.50. (R. 105, 139-141.) The total of the reported and unreported income for the years 1936 through 1941 is therefore approximately $56,500.

In addition to the fact that petitioner failed to keep records of his operations and that he furnished currency to a nominee for deposit by the latter in a "special" account, there was other proof of concealment of income. Petitioner rented a safe-deposit box in a fictitious name (R. 398), and visited the box frequently (R. 294). Currency withdrawn from the safe-deposit box was used to purchase real property, title to which was taken in the name of a third person. (R. 479-481.) Securities were also bought in the names of nominees and were subsequently endorsed to petitioner. (R. 227-229, 327-329, 410-412, 486-487.) And practically all of petitioner's investments and expenditures were made with currency. (R. 215, 218, 224, 228, 231-232, 410-412, 480.) In the interview with the revenue agent on August 9, 1945, petitioner denied that he had assets in any name other than his own (R. 576); denied that he had a safe-deposit box (R. 577); and falsely stated that he had given a mortgage to the nominee in whose name real property had been purchased for a portion of the purchase price of such property (R. 479-481, 576).

Petitioner himself did not testify at the trial, but testimony offered in his behalf, with respect to the amount of his assets prior to 1942, was to the

effect that in 1922, when petitioner was eighteen years old (R. 709-710), his maternal grandmother had loaned him $25,000 for the purpose of financing and enlarging the scope of his hand-book operations, in which he was then engaged "on the side" (R. 694-695, 706-711). The grandmother died in 1931, and the loan has not been repaid. (R. 711-712.) Petitioner's father also testified that, in 1934, he helped petitioner count $100,000 which petitioner kept "in a black metal box" in his bedroom. (R. 695-696, 723.) Two accountants called by petitioner stated that, according to their analysis of petitioner's income tax-returns for the years 1936 through 1941 and of his living expenses and investments during that period, petitioner had available in cash, at the end of 1941, after deducting living expenses and income taxes paid, approximately $57,000, and, if his wife's income during that period was taken into account, approximately $59,000. (R. 744, 766, 817.) One of the accountants also testified that "over a period of years" the petitioner had received $11,280.33 in non-taxable service disability income.[3] (R. 751.)

The case was argued to the jury during the morning of July 1, 1948, and the arguments were concluded at 12:55 p.m. (R. 39.) At that time, petitioner's counsel presented to the court twenty-two requested instructions. (R. 868-884.) The rec-

[3] The revenue agent testified that the amount of this disability income was about $50 per month and that he had disregarded these payments in his computations. (R. 659-660.)

ord does not show that copies of the requests were furnished to Government counsel. (R. 869.) The court excused the jury until 2:30 p.m. for the noon recess, and a colloquy then ensued between the trial court and counsel for the petitioner. (R. 868-869.) The court reminded counsel that it had asked for requests at noon on the day before; that the requests had not been submitted within the time prescribed by the Rules of Criminal Procedure; and that because of the belated submission the court could not give the requested instructions the attention they should have. (R. 868-869.)

At 2:30 p.m., when the trial was resumed, the court said to counsel (R. 869):

> I have gone over the twenty-two instructions submitted to me just before the noon recess by defendant. I think most of them are included in my charge, if not in the language they are requested, the substance of them.

Among the twenty-two instructions requested by petitioner was the following (R. 871-872):

> The Court instructs the jury that the fact that the defendant has not testified in his own behalf does not create any presumption of guilt against him. The Court further instructs the jury that, under the law, the defendant does not have to prove himself innocent of the offenses of which he is charged in the indictment and that, in our courts of justice, the defendant has the right to stand on the presumption of innocence of the offenses of which he is

charged and that he cannot be convicted unless the government has proven the offenses charged against him beyond all reasonable doubt, as the Court has defined that term to you. And the Court further instructs the jury that it must not permit the fact that defendant has not testified in his own behalf to weigh in the slightest degree against the defendant, nor should this fact be permitted to enter into the discussions or deliberations of the jury in any manner.

The charge of the court relative to this same subject was as follows (R. 892, 898):

The defendant is presumed to be innocent, and this presumption abides with the defendant at all stages in this trial, and this assumption continues until the evidence proves the defendant guilty beyond a reasonable doubt.

And the burden of convincing you of the guilt of the defendant rests on the government solely and not on the defendant in any respect whatsoever.

* * *

The burden of proof rests upon the government throughout the case and never shifts, to sustain the charge as set forth in each count; and under the law governing this case, the presence of such testimony in the record of the character I have referred to puts no burden on the defendant to explain where or how he obtained the money so used by him.

At the conclusion of the court's charge, counsel for petitioner took the following exception, among others (R. 906):

> The defendant further objects to the charge of the Court because it did not include an instruction that the fact that the defendant had not testified in his own behalf did not create any presumption of guilt.

ARGUMENT

I

The petitioner contends that the decision of the Court of Appeals in this case is in conflict with the decision of the Court of Appeals for the Fifth Circuit in the case of *J. Baker Bryan, Sr.* v. *United States,* No. 178, October Term, 1949, and with the decision of the Court of Appeals for the Seventh Circuit in the case of *United States* v. *Chapman,* 168 F. 2d 997, certiorari denied, 335 U.S. 853. This contention is predicated upon the claim that the evidence showed only that petitioner's investments and expenditures during the period covered by the indictment were in excess of his reported income for the same period and that there was no evidence at all from which the jury could properly have inferred that such expenditures and investments were made out of current income. (Br. 25, 27.) It is submitted that petitioner's contention is not supported by the record.

The petitioner did not file any income tax returns for any years prior to 1936. (R. 99-100.)

According to petitioner's evidence, which the jury chose not to believe, he had accumulated prior to 1936 the sum of at least $100,000 (R. 694-697; Br. 19, 27) from his hand-book operations which "he established one after another" (R. 695) after he had obtained a loan of $25,000 from his grandmother in about 1922 (R. 694, 709-710). The fact that the petitioner filed no income tax returns for years prior to 1936 belied his contention upon trial that he had earned substantial sums during those years. This fact alone therefore constituted substantial evidence from which the jury could have inferred that petitioner's investments and expenditures during the indictment years came from current income and not from accumulations earned prior to 1936, as he contended.

But there was other evidence, also of a substantial and convincing nature, that petitioner was understating his income during the indictment years. During the course of the investigation which led to the indictment, petitioner stated to the revenue agent that "he had no large sums of currency on hand at any time." (R. 577-578.) Petitioner periodically furnished cash to a nominee who deposited the money in a "special" bank account and then drew checks on the account payable to the officer of a corporation which petitioner controlled—an action entirely inconsistent with the claim that petitioner's investment in this corporation came from prior accumulations of capital. There is, in addition, the wealth of evidence outlined in the

foregoing Statement which shows the elaborate lengths to which petitioner went to conceal his receipt of current income—the renting of a safe-deposit box in a fictitious name, the frequent visits to that box, the purchase of property in a fictitious name with currency withdrawn from the box, the conduct of practically all business transactions with currency and in the names of nominees, the failure to keep records, the attempt to make it appear that he was borrowing money for the purchase of his home from his father, and the false statement to the revenue agent that he had no assets in names other than his own.

Petitioner would attempt to escape the effect of some of this evidence by contending (Br. 28, fn. 3) that it bears only on the question of wilfulness, which, he says, is an element of the offense distinct from proof of receipt of current income. This is a convenient classification, but it will not serve to deprive the evidence of its full significance. The elaborately and deviously woven financial screens behind which petitioner operated do, when penetrated, show wilfulness—and show it in the extreme—but they do not necessarily show only wilfulness. By their very nature they also show that petitioner was attempting to conceal receipt of current income and that he had income in excess of that which he reported during the indictment years.

The Court of Appeals correctly held that the Government was not required to make a perfect case or to prove the petitioner guilty to a mathe-

matical certainty. Petitioner's refusal to accept this well-established principle is the primary reason why he still challenges the sufficiency of the Government's evidence in this case. But, at this stage of the proceedings, the sufficiency of the evidence to sustain the conviction is not to be tested in the light of the Government's evidence alone. Since petitioner elected to put on his own case, after his motion for judgment of acquittal at the close of the Government's case had been overruled, this Court in appraising the sufficiency of the evidence will consider the Government's evidence, not *in vacuo,* but in relation to the evidence adduced by the petitioner. *United States* v. *Goldstein,* 168 F. 2d 666 (C.A. 2d).

Thus considered, there can be no doubt that the record furnishes ample warrant for petitioner's conviction. Petitioner's defense in this case was that the funds which he used to make his large expenditures during the indictment years came, not from any prior gifts or inheritances, but from prior earnings and a $25,000 loan from his grandmother.[4] (Br. 19, 28.) Certainly, in view of the Government's evidence to the effect that the petitioner filed no *income* tax returns prior to 1936 and that the amount of his reported *income* from 1936

[4] Even if this loan is recognized, it would not affect the net worth computation, since the effect of its recognition as a liability is to decrease the net worth both at the beginning of 1942 and the end of 1945, and hence the increases in net worth during the period would remain the same as shown by the proof.

to 1941, inclusive, was barely sufficient to cover his living expenses and a loss which he sustained on an investment, it cannot now be reasonably contended that there was no evidence before the jury to justify an inference that the petitioner did not earn, and consequently did not save, the amounts he claimed he did. Assuming, *arguendo*,[5] that "The *evidence of the government* [did] not exclude the *possibility* that the defendant had some substantial accumulation of capital on December 31, 1941, or that sometime, somehow and somewhere he acquired a large amount of capital out of which he made the loans, investments and expenditures which the government contends reflect income" [emphasis added], as the Court of Appeals states in its opinion (174 F. 2d 397, 399), petitioner is hardly in a position to raise that question now when his own evidence effectively negates the possibility that he acquired by gift or inheritance any appreciable part of the sums which he expended.

The foregoing discussion makes it clear, we believe, that the decisions in *United States* v. *Chapman*, 168 F. 2d 997, certiorari denied, 335 U.S. 853, and in *J. Baker Bryan, Sr.* v. *United States*, decided May 13, 1949 (C.A. 5), are not in conflict with

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[5] Actually, the Government did introduce evidence to the effect that there were no gifts or inheritances prior to 1942. The investigating revenue agent testified that "after a very careful, careful examination" (R. 641), he had not found any gifts or inheritances (R. 609-611, 637-642).

the decision of the Court of Appeals in this case. The principal contention in the *Chapman* case, with respect to the sufficiency of the evidence, was that proof of the starting point for the net-worth computation was based on extra-judicial admissions of the taxpayer which were not corroborated by other evidence. The Court of Appeals for the Seventh Circuit pointed out that, under the rule announced by this Court in *Warszower* v. *United States,* 312 U.S. 342, an extra-judicial admission made prior to the commission of the offense charged in the indictment need not be corroborated by other evidence. Here, the record of petitioner's reported income for the years 1936 through 1941 and the record of his failures to file tax returns for years prior to 1936 constitute proof of admissions made prior to the commission of the offenses charged in the indictment, and hence under the *Warszower* rule did not need to be corroborated.[6] In the *Bryan* case, the Court of Appeals for the Fifth Circuit appraised the evidence and found there was *no* evidence from which the jury could have inferred that

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[6] It is also interesting to note in connection with the *Chapman* case that in order for the Government to prove Chapman's net worth as of January 1, 1943 (the only indictment year), it was necessary to rely, in part, upon Chapman's 1942 return. Chapman, in his petition for certiorari in this Court (No. 252, October Term, 1948), claimed that, since there was a possibility that he had understated his 1942 income on his return, the Government's proof did not establish his net worth as of January 1, 1943, with that degree of certainty required in a criminal case.

the defendant's expenditures were made out of current income. In the present case, the Court of Appeals for the Eighth Circuit appraised the evidence and found that it might "reasonably . . . be inferred, from the defendant's returns for the years prior to 1942, that the likelihood of his having accumulated a large surplus from his activities was negligible." (174 F. 2d, 397, 399.) Moreover, the Court of Appeals for the Fifth Circuit noted "the absence," in the *Bryan* case (*Bryan* R. 356), "of any admissions, records, financial statements, bookkeeping entries, or other findings, or evidence, tending to bind the Defendant as to the lack of additional assets at the beginning of the tax period." Such evidence was present in this case, and the Court of Appeals for the Eighth Circuit noted its presence.

Finally, we believe that the evidence in this case measures up in all respects to the standards prescribed by this Court in *United States* v. *Johnson,* 319 U.S. 503, and, as stated by the Court in that case (p. 517), it is "not a matter of tenuous speculation but of solid proof that there [was income] of a substantial amount which [Schuermann] did not report."

II

After argument to the jury, instead of "at the close of the evidence or at such earlier time during the trial as the court reasonably directs," as is required by Rule 30 of the Rules of Criminal Procedure, *supra,* petitioner handed up to the trial

court twenty-two written requests for instructions. Copies of the requests were not furnished to Government counsel, as the rule provides. Among the twenty-two requests was one patterned after the request which this Court held in *Bruno* v. *United States*, 308 U.S. 287, 293, that a trial court was obliged to give, "when appropriately invoked."

Petitioner now contends (Br. 32) that his failure to comply with the terms of Rule 30 was a mere technical failure and that he had an "indefeasible" right to have the jury told, *in haec verba*, that the fact that the defendant had not testified in his own behalf did not create any presumption of guilt against him.

We submit that, in the circumstances here present, petitioner's belated submission of his request amounted to more than a mere technical violation of a procedural rule, and, moreover, that since the trial court gave the substance of the requested instruction in its charge and petitioner did not advise the trial court or Government counsel that he had elected to have the precise language of the *Bruno* instruction included in the charge, petitioner will not now be heard to claim that the charge was erroneous.

One of the purposes of the requirement in Rule 30 that requests be submitted prior to argument and that copies be furnished to opposing counsel is to enable the trial court to obtain the views of counsel as to the propriety of the instructions requested and to have sufficient time to consider the

requests before the charge to the jury is formulated. That petitioner's actions defeated this purpose is manifest. The colloquy that ensued between the trial court and petitioner's counsel immediately after the requests were submitted shows plainly and unmistakably that because the requests were tardily submitted the court was deprived of an opportunity to give them full consideration. The court reminded petitioner's counsel (R. 868-869):

> * * * the Court *has to have some time to examine instructions.* If it was not for taking a noon recess, I would instruct the jury now. I asked you for your requests yesterday at noon. * * * You read the rules. They require they [the requests] be given the Court a sufficient length of time before the arguments start *so the Court can go over them,* and now you waited until the arguments are in. * * * I am just saying what the record shows you have done, *and why I can not give these instructions the attention they should have.* [Emphasis added.]

About one hour and a half later, when the trial was resumed, the trial court said to counsel (R. 869):

> I have gone over the twenty-two instructions submitted to me just before the noon recess by defendant. I think most of them are included in my charge, *if not in the language they are requested, the substance of them.* [Emphasis added.]

The petitioner was thus given fair warning that, despite the limited time available, the trial court had reviewed the instructions and was of the belief that his charge as then formulated contained the substance of most of the instructions requested. And, indeed, the charge did include the substance of the request now in question. The charge carefully explained that the petitioner was entitled to a presumption of innocence which abided with him at all stages of the proceedings; that the burden of proof was on the Government and never shifted to the petitioner; and, more specifically, that there was (R. 898) "no burden on the defendant to explain where or how he obtained the money so used by him." The import of the charge was therefore the same as the import of the request. Moreover, the language of the charge was strikingly similar to the language of the second sentence of petitioner's request, which read (R. 871-872):

> The Court further instructs the jury that, under the law, the defendant does not have to prove himself innocent of the offenses of which he is charged in the indictment and that, in our courts of justice, the defendant has the right to stand on the presumption of innocence of the offenses of which he is charged and that he cannot be convicted unless the government has proven the offenses charged against him beyond all reasonable doubt, as the Court has defined that term to you.

At the conclusion of the charge, the petitioner took several exceptions (R. 906-907), one of which

was "The defendant further objects to the charge of the Court because it did not include an instruction that the fact that the defendant had not testified in his own behalf did not create any presumption of guilt." Petitioner contends that this exception plus his belated request adequately apprised the trial court and Government counsel that he had elected to have the trial court comment in the precise language of the request on his failure to testify. We do not believe that petitioner's actions can or should be so construed. Petitioner knew, or should have known, from the court's comments and from the charge itself that the court believed it had given the substance of the requested instruction. At no time did petitioner apprise the trial court or Government counsel (who did not even have copies of the requests) that the ground of his objection to the charge was that it did not include the precise language of his request. Rule 30 provides:

> No party may assign as error any portion of the charge *or omission therefrom* unless he objects thereto before the jury retires to consider its verdict, *stating distinctly* the matter to which he objects and *the grounds* of his objection. [Emphasis added.]

Petitioner therefore not only failed to comply with the provisions of the rule regarding the submission of requests before argument, but he also failed, in the particular circumstances present here, to state

distinctly the ground of his objection to the charge as given.

Considering petitioner's actions in the light of the *Bruno* decision, it seems clear that petitioner did not "appropriately invoke" his requested instruction. Moreover, the *Bruno* decision held that "the accused should be allowed to make his own choice" (p. 294) as to whether it would benefit him to have the attention of the jury directed to the fact that he did not take the stand. If an accused wishes to have the attention of the jury specifically drawn to this fact, it would seem to be only elemental fairness that he plainly advise the trial court of his choice. The trial court in this case did not understand from petitioner's actions that he had specifically requested the precise language of the *Bruno* instruction. See opinion of the trial court. (79 F. Supp. 247, 249.)

Petitioner contends, finally, that the decision of the Court of Appeals in this case is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Smith* v. *United States,* 112 F. 2d 217, and with the decision of the Court of Appeals for the Fifth Circuit in *Chadwick* v. *United States,* 117 F. 2d 902. We see no such conflict. The latter two decisions held that it was not error for a trial court of its own motion to include the language of the *Bruno* instruction in the charge to the jury. This was not the equivalent of holding that it would be error for the trial court to fail to give such an instruction of its own motion. In effect,

that is what petitioner contends constituted the error in this case—that the trial court failed of its own motion to employ the precise language of the *Bruno* instruction. In this we think that petitioner is in error.

For the cogent reasons stated by the Court of Appeals in its opinion in this case, we believe that petitioner was also required to furnish Government counsel with a copy of the request.

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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In the

Supreme Court of the United States

OCTOBER TERM, 1949

No. 172

HARRY W. SCHUERMANN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

I.

The Court of Appeals held that the net worth-expenditure method of computing net income could be utilized in this case in spite of the fact that there was no evidence establishing petitioner's net worth at the beginning of each taxable period. Both **J. Baker Bryan, Sr., v. United States,** 5 Cir. (not yet reported), and **United States v. Chapman,** 7 Cir., 168 F. (2d) 997, hold that in a net worth-expenditure case there must be a definite starting point based upon a solid foundation. These rulings are in conflict with that of the decision in the instant case.

In the **Bryan** case the Court held that the case should not have been submitted to the jury because the defendant's net worth at the starting point was not established and the evidence did not exclude the hypothesis that the

funds used in making some of the expenditures might have been from resources other than current business income. The situation here is the same. The only evidence noted by the Court of Appeals as being sufficiently substantial to dispense with a definite starting point were petitioner's tax returns for the years prior to 1942. These returns were said to give rise to a permissible inference that there was "little likelihood" that petitioner had accumulated a "large surplus" from his activities. But this is a mere inference, at best, and such an inference may not properly be used as the basis for drawing the further inference that expenditures and investments thereafter made in each of the four following years were attributable solely to current income. This question is presented by the petition for the writ. The Government's Brief does not meet the issue.

The Government says merely that there is "other evidence" not mentioned by the Court of Appeals. But this "other evidence" referred to by the Government is no more substantial in proving receipt of net income than that noted by the Court of Appeals. The weakness of the Government's case is strikingly shown in its contention that the "fact alone" that no tax returns for the years prior to 1936 were found (and therefore presumably not filed) constitutes substantial evidence from which the jury could have inferred (speculated?) that investments and expenditures made in 1942 came from 1942 net earnings, those in 1943 from 1943 net earnings, and so on for the other years.

The argument that petitioner "periodically" furnished cash to a nominee for deposit in a special account for payment to a newly organized corporation refers to an incident involving a portion of the single year 1944. Dur-

ing the organization period of St. Louis Finance Company and as its activities were starting, petitioner advanced funds to one of the three organizers to meet his part of the capital stock payments as they were called for by the corporation. The corporation neither wanted nor desired more funds in its bank account than it currently required for its business purposes. It is not reasonable to believe that this $150,000 finance company would have been organized in early 1944 with only the hope or expectation that petitioner would thereafter "periodically" earn sufficient funds to be turned over to the corporation, and this is particularly so when it is realized that even according to the Government the earnings of petitioner did not exceed $50,000 for both 1942 and 1943 combined, before payment of taxes and living expenses. It is obvious that petitioner must have had available, prior to 1942, the funds which he had agreed, in 1938 (R. 737-738, 734-735), to invest in the corporation. But in any event this evidence can have no application to 1942, 1943 and 1945, each of which years involves a separate charge.

Other than the evidence pertaining to alleged wilfulness, the foregoing is all the evidence cited by the Government as being sufficient to permit the jury to infer that petitioner's investments and expenditures in each year were made out of current income. But none of this evidence removes the case from the realm of speculation.

Without a definite starting point, the case is no longer a net worth-expenditure case. It is merely an expenditure case alone, since there can be no proof of net worth without evidence establishing how much the defendant is actually worth at the commencement of the tax year in question. If in lieu of fixing the accused's net worth at the start of the indictment year one may substitute an infer-

ence, based either upon prior tax returns, or lack of such tax returns, that there is "little likelihood" that he had accumulated a "large surplus", not only is presumption substituted for fact but the presumption itself is left in doubt. How large is a "large surplus"?

It will not do to add all expenditures for the four years, as does the Government, and compare the total with the aggregate reported net income for such period. This for the reason that each year constitutes a separate offense, a fact which has been lost sight of not only by the Court of Appeals but by the Government as well. Actually, when 1942 is considered apart from subsequent years, as of course it must be, no "large surplus" is necessary to take care of the amount of even the alleged disparity between expenditures and reported income. The same is true as to 1943.[1] It will be noted that the net income reported for 1941 was approximately $15,000 and there is no basis in the evidence to support any contention that the major part of this income was not available for expenditure in 1942. The Government's claim that the amount of petitioner's reported income for the years prior to 1942 was barely sufficient to cover his living expenses and a loss of $15,450 does not take into account the 1941 income, for the simple reason that the loss (which was sustained in 1943) was on an investment made in 1940, the year before 1941 income was received. When to the foregoing is added the non-taxable disability income, which in the aggregate amounted to over $11,000 but which was "disregarded"

[1]As to 1942, the Government charged an excess of about $5,400. This includes a Melvin Heil note for $2,000 as to which there is no evidence and a tax payment of $4,353.70, although the correct figure was $2,578.80 (R. 75). Taking account of these items and adjusting depreciation and other items there is virtually no disparity whatever. So, too, as to 1943. Here, the Government failed to give petitioner credit for the conceded loss of $15,450 and charged him with $10,000, the amount of a loan made in January, 1944, on the theory that he "must" have possessed it in 1943 and therefore presumably earned it in that year (R. 637, 644).

by the investigating agent, and the additional income of almost $18,000 for the years 1938, 1939 and 1940 which had not been included in the returns for those years, such items alone account for a much larger amount than would be necessary to make the expenditures for 1942 and 1943 which the Government claims were made from unreported income.[3]

Petitioner respectfully submits that neither the inference used by the Court of Appeals nor the so-called admission from the prior tax returns relied on by the Government in its Brief constitutes sufficient substantial evidence upon which to base a finding that petitioner had no assets as of January 1, 1942, and that all expenditures thereafter made were attributable to current income. It is further submitted that even if this evidence could support a finding that 1942 expenditures were made out of 1942 income alone, in spite of the fact that no "large surplus" would be necessary for such disbursements, there would remain no starting point whatever for each of the subsequent years. If the starting point for 1942 is the assumed lack of a "large surplus" at the commencement of that year, what is the starting point which may be used for each year thereafter? The Court of Appeals overlooked this question and the Government's Brief ignores it on the convenient assumption that the four years constitute a single period of time instead of four separate and distinct years.

The Government presented no evidence whatever of income. It relied merely on the theory that proved ex-

[3]If the $25,000 loan to petitioner from his grandmother is "recognized" (Govt. Br. 14), then even the insubstantial inference from prior returns is of no value as the starting point for 1942 and 1943. The Government's argument that this item would not affect the net worth computation merely begs the issue, since net worth was not proved. Even though the liability offsets the asset, the money would nevertheless be available out of which to make expenditures and investments in excess of current income.

penditures and investments could be assumed to have been made out of current income. But such evidence proves only that petitioner made the expenditures and investments. It may not properly be argued that the 1942 return is an admission against interest which may be used to support the inference that expenditures made in 1943 were made out of 1943 income. This for the reason that the Government has charged that the 1942 return was not correct, and certainly an unreversed conviction for such year constitutes a judicial determination to such effect. The identical reasoning is applicable to the years 1944 and 1945. On the Government's theory, if petitioner had spread a one year's receipt of income or prior accumulation of capital over a ten-year period he would be guilty of ten separate violations of the income tax laws, without any evidence other than the excess of investments and expenditures over reported net income for each year. Petitioner respectfully submits that in view of the fact that each year constitutes a separate charge, the burden is upon the Government, in a net worth case, to prove that the investments and expenditures made in a particular year did not come out of capital held by the defendant as of January 1 of the year in which the expenditures and investments were made. This burden is not sustained where, as here, there is no proof of net worth.

Apparently in an effort to bring this case within the rule of **United States v. Johnson,** 319 U. S. 503, the Government's Brief argues that the "elaborately and deviously woven financial screens behind which petitioner operated * * * show * * * that he had income in excess of that which he reported during the indictment years." Not only is this assertion a non sequitur, but it is not borne out by the record. Petitioner did not operate behind financial screens either "elaborately and deviously woven" or otherwise.

In the **Johnson** case there was a wealth of evidence pertaining to the manner in which the business was operated and the only issue was whether Johnson's relation to the business was that of proprietor or patron. In this case there was not even a scintilla of evidence pertaining to the business operated by petitioner or the manner of its operation. In fact the Government apparently deliberately ignored presenting any evidence as to petitioner's business operations except the designation of such business as policy. What the Government has reference to is evidence offered for the purpose of showing wilfulness. But even this evidence does not approach the strength contended for by the Government. As to 1942 none of the evidence is applicable unless it be the fact that petitioner used currency in making loans in his own name to personal friends. In 1943 petitioner merely rented a safety deposit box in a fictitious name but there was no evidence as to his purpose in renting it or what use he made of it. In 1944 he made an investment in corporate stock. In 1945 he purchased his home in the name of his father and purchased a lot jointly with his wife. The characterization of this evidence as being "elaborately and deviously woven financial screens behind which petitioner operated" does not add to its strength nor does it constitute proof that petitioner received current income in each of the four years in excess of that reported by him. Petitioner respectfully submits that the Government's evidence was insufficient to sustain his conviction and that the Court of Appeals erred in ruling the contrary.

The Government asserts that the Court of Appeals for the Eighth Circuit appraised the evidence in this case and made its finding on the basis of such appraisal. But the opinion shows that the decision was primarily based on the view that income tax evasion cases are different than

other criminal cases and that the judgment of the trial court as to the sufficiency of the evidence is to be heavily relied on on appeal. The Government's Brief ignores petitioner's complaint that he was in effect deprived of his right of appeal by the failure of the Court of Appeals to appraise the evidence independently of the trial court. This is a serious question which should be ruled on by this Court.

Petitioner submits that the opinion of the Court of Appeals clearly discloses its view that a defendant may be convicted of tax evasion for four consecutive years upon evidence showing no more than that the gross amount of expenditures and investments during the four-year period exceeded the aggregate reported net income for such period without a showing of the defendant's net worth at the beginning of each of the four yearly periods. In so ruling and holding, there is the conflict shown by petitioner. It is submitted that the time has come for this Court to squarely consider this important question because of its frequent recurrence. This Court should not permit the severe sentence imposed upon petitioner to stand upon the speculative basis held proper by the Court of Appeals for the Eighth Circuit.

II.

In **Bruno v. United States**, 308 U. S. 287, this Court held that it was error prejudicial to the defendant for the trial court to fail in his duty to instruct the jury that no presumption is created against a defendant who does not testify in his own behalf. The trial court in the instant case failed in such duty and petitioner was materially prejudiced thereby. The Court of Appeals held that the error did not entitle petitioner to a reversal. The conflict with the **Bruno** case is apparent.

The Government's Brief concedes that the instruction requested by petitioner, similar to the **Bruno** instruction, was one which the trial court was obliged to give, but only "when appropriately invoked". The Government contends that the substance of the requested instructions was given by the trial court in his charge to the jury and that the trial court was not sufficiently advised of petitioner's desire to have the attention of the jury directed to the effect to be given to his failure to testify. The Government is in error in both contentions.

In the first place, it cannot reasonably be held that the import of the charge given by the trial court is the same as the import of the requested instruction. Neither the trial court nor the Court of Appeals so held. In fact, the Government did not so argue below. The present contention of the Government appears to be based upon the fact that the charge contained an instruction on the presumption of innocence and the burden of proof. But such instructions should be given in **every** case whether or not the defendant testifies. Defendants who testify are clothed with the same presumption of innocence as those who do not. The burden of proving a defendant guilty beyond a reasonable doubt is upon the Government in **every** case, without regard to whether the defendant testifies.

It is obvious that instructions informing the jury as to the law of the burden of proof and the presumption of innocence do not, and are not intended to, inform the jury in substance or otherwise that the failure of a defendant to testify in his own behalf creates no presumption against him. See **Stout v. United States,** 8 Cir., 227 Fed. 799. Nor does the so-called specific charge that testimony as to expenditures puts no burden on defendant to explain where or how he obtained the money relate to any subject other than the burden of proof. If anything, this

specific instruction was definitely hurtful to defendant because the issue, on the Government's theory, was not so much where or how petitioner obtained the money he spent, but **when** he obtained it (i.e., whether before or during the indictment years), and as to this essential point the charge was silent and might have been construed to place such burden upon petitioner.[3]

In its Brief, the Government argues that petitioner's claim is that the error in this case consisted of the trial court's failure "of his own motion to employ the **precise language** of the **Bruno** instruction." Petitioner has never so contended. His position is simply that it was the duty of the trial court to tell the jury in appropriate language that the fact defendant has not testified creates no presumption against him. The instruction requested by Bruno aptly expresses such rule of law; but the action of the trial court which was held erroneous by this Court was not the failure to employ the "precise language" of the requested instruction but rather the failure to tell the jury in substance what Bruno asked the Court to tell it. That is the complaint which petitioner is here making. There simply was no instruction whatever on the subject.[4]

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[3]Immediately following this portion of the charge, the Court posed a series of questions for the jury's consideration. Some of these could be answered only by petitioner. The last two of the questions were as follows:

"And where did the defendant obtain the money to make these investments?

"Also equally consider, were they made from money held by the defendant before the year 1941 or before the year for which the investments were made and charged against the defendant by the government, or were they made from earnings in the year in which the government charges, and were they shown upon the defendant's income tax return as filed by him?" (R. 900).

In view of the charge, the need for the requested instruction or its substance was all the more vital.

[4]That the Court's charge was "strikingly similar to the language of the second sentence of petitioner's request" (as argued by the Government) means only that *part* of the instruction was given in substance, and that the trial Court intentionally omitted the first sentence telling the jury that petitioner's failure to testify created no presumption against him. This was error. See *Hersh v. United States*, 3 Cir., 68 F. (2d) 799, 807.

The opinion filed by the trial court (74 Fed. Sup. 247) does not even intimate that the trial court believed his charge covered the subject of the requested instruction. In fact, the contrary belief is clearly indicated. Since the substance of the petitioner's request was not included in the charge, the conflict with the **Bruno** decision is obvious.

Using the same erroneous premise as to the nature of petitioner's complaint, the Government's Brief argues that petitioner's objection to the charge was not sufficient to apprise the trial court of his grounds therefor. At least four times in its Brief the Government says that the "ground" of petitioner's objection to the charge was that it did not include "the precise language" of his request. Not once, either in the petition or Brief filed in this Court or in any Brief filed in the courts below, has petitioner contended that it was necessary that the trial court employ the "precise language" of the requested instruction. The ground of petitioner's objection to the charge is not that the precise language of the **Bruno** instruction was not included therein but simply that the Court did not include **any** instruction on the subject of the effect of petitioner's failure to testify. The objection made to the charge adequately states this ground.

The Government further argues that the "belated" submission of petitioner's request for the instruction deprives him of his right to be heard to claim that the charge should have included an instruction on the subject of the requested instruction. This is the point ruled by the court below, and is an important question which should be authoritatively decided by this Court.

Rule 30 does **not** provide that a defendant has no right to request an instruction subsequent to the argument nor that if he does so, error may not be assigned with respect

to the refusal to instruct on this material matter. In the instant case, the trial court did in fact consider the request and refused it after deliberation. Since the subject is one on which a defendant is entitled as of right to have the jury instructed, certainly upon request, it does not comport with justice to hold that although the instruction should have been given and was considered by the trial court before reading his charge, the defendant may not assign error on a matter so vitally affecting his interest. To so hold means that the right to elect whether the instruction should be given is in the trial court and not in the defendant if the request is made after instead of prior to the argument. But the **Bruno** case held that "the accused should be allowed to make **his own** choice." With the liberty of petitioner at stake, it is submitted that he should not be deprived of his right to elect to have the jury told the effect of his failure to testify simply because he submitted his request "belatedly", some 95 minutes before the charge was read to the jury. Rule 30 provides no such penalty. The Court should not impose it.

It is the Government's view, apparently, that petitioner should not be heard to complain of the conceded error affecting his substantial rights for the reason that the trial court was "deprived" of an opportunity to give the requested instruction full consideration. The Brief quotes from statements made by the trial court at the time the instructions were presented, criticizing counsel for the "belated" submission. Although it would seem that with the liberty of petitioner at stake the trial court could, if necessary, take several additional minutes to study the requested instructions, the trial court actually did give full and adequate consideration to the requests. When the trial was resumed over one hour and 30 minutes later, the Court did not even suggest that the consideration he

had given to the instructions was not adequate. He expressly stated that he had considered and reviewed all of them and that "most" of the requests were included in substance in his charge. He did not at any time indicate that he needed or wanted the views of counsel as to the propriety of any of the requested instructions, and Government counsel, although present, maintained complete silence. Moreover, the opinion filed by the trial court does not even imply that the request was inadvertently refused because of lack of opportunity to fully consider the instruction. Surely if the trial court believed that his failure to give the instruction was due to an inadequate opportunity to consider the same he would have said so in his opinion.

But was the request "belated", in view of the argument made to the jury by Government counsel? This question is presented by the petition for certiorari. It was argued in the court below but not referred to in the Court's opinion. The Government's Brief does not consider the question. This Court should.

The last sentence of Rule 30 provides that no party may assign as error any omission from the charge unless he objects thereto before the jury retires to consider its verdict. This portion of Rule 30 does not necessarily refer to a requested instruction. It refers to any omission from the charge which counsel believes prejudices the rights of his client. In the instant case petitioner did object to the omission from the charge of an instruction informing the jury that the fact defendant had not testified in his own behalf did not create any presumption of guilt against him. This objection was made after the Court asked for suggestions on the part of defendant (R. 906). It clearly gave notice to the trial court that petitioner believed the charge was hurtful to him by its omission of such an

instruction. It is difficult to comprehend how much more plainly the trial court could have been advised that petitioner had chosen to have the jury instructed to such effect. What other reason could he have for complaining about the deficiency of the charge on this point?

Even if petitioner had not specifically objected to the omission from the charge, any such assumed violation of the Rule would not preclude review. The Government overlooks (just as did the Court of Appeals) Rule 52(b) which provides that plain errors or defects affecting substantial rights may be noted even though not brought to the attention of the trial court. This rule is in **pari materia** with Rule 30. **Ryles v. United States,** 172 F. (2d) 72[5]; **United States v. Ward,** 168 F. (2d) 226, 228. The error here is plain. It prejudicially affects petitioner's substantial rights. It was, moreover, called to the attention of the trial court in ample time for corrective action. Surely, in a case involving the liberty of a defendant and under the circumstances here present, Rule 30 should not be construed to deprive petitioner of what the **Bruno** case holds is an indefeasible right.

Petitioner submits that the decision below holding that the material error of the trial court prejudicing petitioner's rights does not entitle him to a reversal is not only in conflict with the **Bruno** case but presents an important question of law pertaining to the proper construction of Rule 30 as applied to the Act of March 16, 1878, which this Court should decide.

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[5]In the *Ryles* case, the Court failed to instruct on entrapment. There was no request for such an instruction, no objection whatever to the charge and no suggestion of any further instructions. The judgment was affirmed on the theory that the failure to instruct on the subject was not plain error, under Rule 52(b). This Court vacated the judgment of the Court of Appeals (336 U. S. 949). See also *United Brotherhood of Carpenters & Joiners of America v. United States,* 330 U. S. 395.

CONCLUSION.

Petitioner respectfully submits that a writ of certiorari should be granted to decide the important questions of law involved and resolve the conflict of decisions.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1949

No. 172

HARRY W. SCHUERMANN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

Comes now petitioner and respectfully petitions the Court to set aside the order entered on October 10, 1949, denying certiorari, and to grant petitioner a rehearing of his petition for certiorari.

For grounds of this petition, petitioner states as follows:

1. Subsequent to the filing of the petition herein for certiorari there was filed in this Court a petition on behalf of J. Baker Bryan, Sr., for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit (No. 178). The Court granted this petition on October 10, 1949. Certiorari was sought in the instant case for the reason, among others, that the decision of the Eighth Circuit against peti-

tioner was directly in conflict with the decision of the Fifth Circuit in the case of **Bryan v. United States**, 175 F. (2d) 223. The Eighth Circuit Court of Appeals held that although the case against petitioner was based upon the net worth-expenditure method the trial court did not err in denying petitioner's motion for a judgment of acquittal and submitting the case to the jury even though there was no evidence of defendant's net worth and the evidence showed little more than that the aggregate amount of petitioner's expenditures and investments exceeded reported net taxable income. The Fifth Circuit Court of Appeals held that since the case against Bryan was based upon net worth-expenditure method a prima facie case was not made against him and the case should not have been submitted to the jury because the Government failed to prove Bryan's net worth at the starting point. The decisions are squarely in conflict with each other. It is true that the point on which certiorari was granted in the **Bryan** case is not the precise question involved in the petition herein, but the fact that certiorari was granted is a circumstance which should be taken into account by this Court in ruling the merits of the present petition. If this Court should hold that the Court of Appeals for the Fifth Circuit properly remanded the case for a retrial, then the question still remains as to whether the Eighth Circuit or the original Fifth Circuit decision states the proper rule to be applied. On the other hand, if this Court should hold that Bryan was entitled to a judgment of acquittal, then the necessary consequence is that whether one must serve a term in the penitentiary is dependent upon the accident of residence. It is not consonant with justice to permit one rule of law to apply in one part of the country and another rule to apply in another part. Petitioner submits that uniformity of decisions should impel this Court to consider the questions involved in the instant petition.

2. The very fact that certiorari was denied in this case will have an important ultimate effect in income tax evasion prosecutions. The decision of the Eighth Circuit Court of Appeals to the effect that on appeals in such cases reliance must be placed upon the judgment of the trial court in appraising the sufficiency of the evidence is a clear notice to defendants that once the District Court has denied a motion for a judgment of acquittal such action is for all intents and purposes final and the appeal is futile. The result is to perpetuate the error of the Court of Appeals in holding that a net worth-expenditure case may be made without proof of net worth. Petitioner submits that this Court could not have been aware of the significance of the decision in this case as it affects both prosecutions and civil income tax cases. The denial of certiorari has the effect of giving carte blanche authority to the courts and Government officials in utilizing the net worth-expenditure method of computing net income without establishing the taxpayer's net worth at the starting point by relying on suspicion and guesswork. The recent tendency of the courts has been to yield to Government pressure in order to facilitate convictions in tax evasion cases, and aside from the lone decision of the Fifth Circuit, the courts take the easy way out by deferring to the judgment of the lower court. This makes for unsound law and departures from accepted principles of due process.

3. By holding that petitioner was not entitled to a reversal of the judgment on account of the failure of the trial court to instruct the jury that the fact that petitioner did not testify created no presumption against him, the Court of Appeals below deprived petitioner of his liberty without due process of law. This ground was not previously presented although available to petitioner. The fact that petitioner was entitled to such an instruction and that the

failure to give it was error affecting petitioner's substantial rights is not disputed, and cannot be, under the decision of **Bruno v. United States,** 308 U. S. 287. The fact that the trial court was under a duty to give the instruction, coupled with the further fact that the Court of Appeals considered the question, makes it clear that the so-called "fatal" procedural error on the part of petitioner's trial counsel should not be given the effect of depriving petitioner of his right to a reversal by reason of the conceded error on the part of the District Judge. To place the procedural requirements of Rule 30 above the constitutional rights of petitioner, as did the Court below, is in effect a denial of due process of law. Surely, certiorari was not granted to Bruno because of the effect of the question on Bruno's rights alone. This Court, in that case, was of the opinion that an important question in the administration of criminal justice was involved. Yet if the right to which this Court held Bruno was entitled may be taken away by indirection it means that the doctrine of the **Bruno** case is no longer applicable except under an identical state of facts.

4. This Court, in denying certiorari, has no doubt overlooked the significance of the construction given to Rule 30 by the Court of Appeals in depriving petitioner and others similarly situated of trial according to the concepts of due process of law. If a defendant is entitled to choose whether an instruction with respect to the effect of his failure to testify should be given, how can he, in the ordinary case, make an intelligent choice until after counsel has argued the case? What the prosecutor says in the argument, and how he says it, is often of controlling effect in deciding whether it will benefit a defendant to have the jury told that his failure to testify shall not count against him. In the instant case, petitioner believed that what the Government attorneys said in their argument (R. 832, 835, 863)

constituted a derogatory comment on his failure to testify. Is it consonant with fairness and justice that petitioner should have anticipated that such argument would be made and that he should have made his choice on the matter of the instruction to the jury before counsel argued the case, under penalty of losing such right if the choice is not then made? To so hold is to deprive him of his right of choice to which he is entitled under the **Bruno** decision as well as the Fifth Amendment to the Constitution, and thereby he is deprived of a fair trial held in accordance with the American concept of due process.

Petitioner respectfully submits that this Court should reconsider its order of October 10, 1949, denying certiorari, because the questions involved are of great importance both in connection with the ever-increasing number of tax evasion prosecutions on the net worth-expenditure method and the proper construction of Rule 30 as applied to the Act of March 16, 1878, and Rule 52(b). It is submitted that where, as here, there is error concededly affecting a defendant's substantial rights, it cannot rightly be said that he has been justly and fairly convicted. The questions, however, do not merely concern the justice of petitioner's conviction. They are of general importance and must be decided by this Court if there is to be uniformity of decision and proper construction of the statutes and rules involved. The order denying certiorari should be set aside and certiorari granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

We, Jerome F. Duggan, Robert Kratky, Morris A. Shenker, and Joseph Nessenfeld, counsel for petitioner herein, do hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay, and we do further certify that the petition is restricted to intervening circumstances of substantial effect and other substantial grounds available to petitioner although not previously presented.

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